

# Judicial Council of California

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## INVITATION TO COMMENT SP16-05

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<b>Title</b> Judicial Administration: <i>Judicial Branch Contracting Manual</i>	<b>Action Requested</b> Review and submit comments by 5:00 p.m., April 5, 2016
<b>Proposed Rules, Forms, Standards, or Statutes</b> Revise <i>Judicial Branch Contracting Manual</i>	<b>Proposed Effective Date</b> July 1, 2016
<b>Proposed by</b> Judicial Council Staff Legal Services John Prestianni, Supervising Attorney Oliver Cheng, Attorney	<b>Contact</b> Oliver Cheng, Attorney (818) 558-3076 oliver.cheng@jud.ca.gov

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### Executive Summary

At the Judicial Council’s business meeting on August 26, 2011, the council adopted the *Judicial Branch Contracting Manual* effective October 1, 2011, the operative date of substantive requirements of the California Judicial Branch Contract Law.<sup>1</sup> The council adopted revisions to the manual in December 2011, April 2012, August 2012, December 2013, and June 2015.

In consultation with the Judicial Branch Contracting Manual Working Group,<sup>2</sup> staff has made additional proposed revisions to the manual, and invites public comment regarding the proposed revisions.

### Background

With certain exceptions,<sup>3</sup> the Judicial Branch Contract Law, enacted March 24, 2011, requires that California judicial branch entities comply with the provisions of the Public Contract Code applicable to state agencies and departments related to the procurement of goods and services.<sup>4</sup> The Judicial Branch Contract Law applies to all covered contracts initially entered into or

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<sup>1</sup> PCC, §§ 19201–19210, henceforth referred to as “Judicial Branch Contract Law.”

<sup>2</sup> The working group includes representatives (with experience in contracting and procurement) from small, medium, and large courts throughout California.

<sup>3</sup> PCC, §§ 19204(c), 19207, and 19208.

<sup>4</sup> *Id.*, § 19204(a).

*The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.*

amended by judicial branch entities on or after October 1, 2011.<sup>5</sup> The Judicial Branch Contract Law also requires the council to adopt a judicial branch contracting manual containing policies and procedures applicable to judicial branch entities related to the procurement of goods and services.<sup>6</sup>

At the council's business meeting on August 26, 2011, the council adopted the *Judicial Branch Contracting Manual*. The council adopted revisions to the manual in December 2011, April 2012, August 2012, December 2013, and June 2015. The version of the manual adopted at the council's June 2015 regular business meeting remains in effect as of the date of this invitation to comment.

Following the adoption of the manual by the council in August 2011, staff has continued to work closely with the Judicial Branch Contracting Manual Working Group to revise the manual. The working group includes members from the Court Executives Advisory Committee (CEAC). In addition, in the course of regular interactions with the courts, staff has had the opportunity to receive feedback and questions about the contents and requirements of the manual.

In consultation with the working group, staff has made additional proposed revisions to the manual, and invites public comment regarding the proposed revisions. Following the public comment period, staff plans to submit the proposed revisions to the manual for review by the Advisory Committee on Financial Accountability and Efficiency for the Judicial Branch. It is anticipated that the proposed revisions to the manual will be considered by the Judicial Council at its June 2016 meeting, and if adopted by the council, the effective date of the revised manual would be July 1, 2016.

## **Summary of the Proposed Revisions to the Manual**

### **Revisions Resulting from Audit**

The Judicial Branch Contract Law requires the California State Auditor to perform biennial audits of the Judicial Council to assess the implementation of and compliance with the Judicial Branch Contract Law.<sup>7</sup> On December 10, 2015, the California State Auditor delivered a report to the Governor and legislative leaders regarding its most recent audit.<sup>8</sup>

As part of the audit, the California State Auditor reviewed the extent to which the policies and procedures in the manual were consistent with the Public Contract Code and substantially similar to the *State Administrative Manual* (SAM) and the *State Contracting Manual* (SCM), as required by law.<sup>9</sup> The California State Auditor found that the manual generally met these requirements, but noted that the manual did not include a reference to fuel economy standards recently added to the SAM that are applicable to the judicial branch's vehicle purchases.<sup>10</sup> These standards are

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<sup>5</sup> *Id.*, § 19203.

<sup>6</sup> *Id.*, § 19206.

<sup>7</sup> *Id.*, § 19210(c).

<sup>8</sup> The full report is available at <https://www.auditor.ca.gov/pdfs/reports/2015-302.pdf>

<sup>9</sup> *Id.*, § 19206.

<sup>10</sup> The fuel economy standards, which are applicable to judicial branch entities under Public Resources Code § 25722.7(e), were effective July 1, 2015.

required by Public Resources Code section 25722.7, and pursuant to this statute, the standards are set forth in section 3620.1 of the SAM.<sup>11</sup>

The California State Auditor recommended that the Judicial Council update the manual to include these minimum fuel economy standards for the judicial branch's vehicle purchases.<sup>12</sup> In its response to the California State Auditor's recommendation, the Judicial Council stated that it intended to include a reference to the fuel economy standards in the next revision of the manual.<sup>13</sup> Therefore, it is proposed that a reference to the fuel economy standards be added to Chapter 4A of the manual (in the Motor Vehicles section on page 12).

### **Other Revisions**

- Revisions were recently made to the *State Contracting Manual* to clarify that the exemption from competitive bidding for procurements from local government entities also includes local government entities in states other than California.<sup>14</sup> Therefore, edits are proposed for Chapter 5 (in section 5.3, on page 5) of the manual to reflect the clarification in the SCM.
- Public Contract Code section 10295.35, which became effective January 1, 2016, places limitations on contracts with contractors that discriminate in the provision of benefits on the basis of any employee's or dependent's actual or perceived gender identity. Therefore, in Chapter 8 (in Appendix A, page 17) of the manual, an edit is proposed to reflect Public Contract Code section 10295.35.
- Members of the Judicial Branch Contracting Manual Working Group have expressed that the manual would be more helpful for judicial branch entities in their procurement and contracting activities if it included a reference to public works contracting and procurement pursuant to SB 854 (Stat. 2014, Ch. 28), which added new Labor Code requirements relating to vendor registration with the Department of Industrial Relations. Therefore, to add this reference, edits are proposed for Chapter 4 (pages 12-13) and Chapter 8 of the manual (in Appendix C, pages 30-31, along with cross-references to these edits on pages 11 and 23).

### **Request for Specific Comments**

Comments are invited on the proposed revisions to the manual and on the following questions:

1. Are the revisions clear and understandable?
2. Do the revisions appear to work from a court operations perspective, e.g., do they conflict with any aspect of court operations or appear to make any incorrect assumptions?
3. Are the revisions user-friendly? Do the revisions appear to work for courts of different sizes and staffing capabilities?

<sup>11</sup> Public Resources Code § 25722.7(a), (b), and (e).

<sup>12</sup> Page 23 of the report by the California State Auditor.

<sup>13</sup> Letter dated November 19, 2015, from Martin Hoshino, Administrative Director of the Judicial Council, to the California State Auditor (included as page 27 of the report by the California State Auditor).

<sup>14</sup> SCM (Vol.1), § 3.06, revised April 2015.



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 4  
Page 1 of 26

## COMPETITIVE SOLICITATION OVERVIEW

### CHAPTER 4

Original Release Date:  
October 1, 2011

Revised Effective:  
July 1, 2016<sup>5</sup>

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## **INTRODUCTION**

This chapter discusses topics that arise in multiple types of competitive solicitations. Chapters 4A, 4B, and 4C of this Manual provide specific guidance for procurements of non-IT goods, non-IT services, and IT goods and services, respectively. To reduce repetition of similar information, each of those chapters refers to sections contained in this chapter.

## **DEFINED TERMS**

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

### **4.1 THE BASICS OF COMPETITION**

Competition is one of the basic tenets of procurement under the California Judicial Branch Contract Law. The type of competition will vary depending on the type of goods or services to be procured, as well as the value of the procurement.

#### **A. General Requirements**

Judicial Branch Entities (JBEs) must conduct competitive procurements in a manner that promotes open, fair, and equal competition among Prospective Bidders. Generally speaking, a procurement must be competitive unless it falls into one of the categories covered in chapter 5 of this Manual.

Buyers conducting competitive procurements must provide qualified Prospective Bidders with a fair opportunity to participate in the competitive solicitation process, stimulating competition in a manner conducive to sound fiscal practices without favoritism, fraud, or corruption.

#### **B. Developing Prospective Bidder Resources**

1. Contact lists: JBEs should establish contact lists using a variety of means to identify Prospective Bidders. Resources available to JBEs to identify and/or establish contact lists include:

- Recommendations from customers;
- Local trade unions;
- Chambers of commerce;
- Industry listings;

- Leveraged Procurement Agreement (LPA) databases;
- Certified Disabled Veteran Business Enterprise (DVBE) databases;
- Internet searches; and
- Telephone directories.

2. Request for Interest: JBEs may use a Request for Interest (RFI) to separate those Prospective Bidders that intend to participate in an upcoming solicitation from those that have no interest in participating. RFIs are typically used when there is an excessively large pool of Prospective Bidders.

The RFI establishes or supplements the contact list for Buyers to use when distributing a Solicitation Document. A copy of the Solicitation Document will be provided to all responding Prospective Bidders. The Buyer should retain the RFI and the contact list in the procurement file.

An RFI should:

- Be short, concise, and to the point;
- Include the solicitation number and title;
- Include a general description of the goods or services to be solicited;
- Include estimated quantities, features, general time frames, any pertinent geographic information, Buyer's name and telephone number, etc.;
- Not provide or ask for any cost information, as such information could create an unfair bidding environment;
- Provide space for Prospective Bidders to supply contact name, address, telephone number, and submittal date; and
- Include where and how to submit the response to the RFI.

**Note:** Nothing in this section limits a JBE's ability to use a "request for information." A request for information is used to gather information about goods or services available in the marketplace, what goods or services generally cost, or similar topics. A request for information is not used to separate those Prospective Bidders that intend to participate in an upcoming solicitation from those that have no interest in participating.

### C. Confidentiality

1. Period of confidentiality: During the solicitation development, information regarding the solicitation is confidential. This is to prevent any Prospective Bidder from obtaining an unfair advantage. See chapter 4A, 4B, or 4C (as applicable) of this Manual regarding the confidentiality of Bids.

Although a Bid may have pages marked “confidential” or “proprietary,” the Bid may be subject to release in response to a CRC 10.500 request. See chapter 11 of this Manual for further discussion.

2. Confidentiality/conflict statements: In addition to the Buyer, other personnel may be involved in the solicitation development, evaluation, and selection process. The JBE may adopt a requirement in its Local Contracting Manual that these personnel sign confidentiality/conflict statements.

A confidentiality/conflict statement typically requires that the person signing:

- Certify that all information concerning the procurement will be kept confidential and secure;
- Certify that no information will be disclosed to any party who has not signed a confidentiality/conflict statement;
- Acknowledge that the information to be kept confidential includes, but is not limited to, specifications, administrative requirements, terms and conditions, and includes concepts and discussions as well as written or electronic materials;
- Acknowledge that if the person leaves the procurement project before it ends, all procurement information must still be kept confidential;
- Agree that any instructions relating to the confidentiality of procurement information will be followed;
- Acknowledge that any unauthorized disclosure may be a basis for civil or criminal penalties and/or disciplinary action;
- Agree to advise the Buyer immediately in the event the person either learns or has reason to believe that someone who has access to confidential procurement information has disclosed or intends to disclose that information in violation of a confidentiality/conflict statement;
- Certify that the person has no personal or financial interest and no present or past employment or activity that would be incompatible with participation in the procurement; and
- Agree that no gift, benefit, gratuity, or consideration will be accepted from any Prospective Bidder.

## D. Advertising

1. When advertising is required: JBEs are sometimes required to advertise solicitations. Even when a JBE is not required to advertise a solicitation the JBE may wish to do so to increase competition.

**Note:** A JBE does not need to advertise any non-competitively bid procurement. See chapter 5 of this Manual for more information regarding non-competitively bid procurements.

The requirements for advertising depend on the type of procurement: non-IT goods, non-IT services, or IT goods and services. See the applicable section in chapters 4A, 4B, and 4C of this Manual.

2. Types of advertising: A JBE may advertise a solicitation by:

- posting a notice on its own website;
- placing an advertisement in print media;
- submitting the procurement to the California State Contracts Register (CSCR), which may be accessed via DGS's eProcurement system;<sup>1</sup>
- posting a notice to another electronic bidding system; or
- other methods the Buyer determines are reasonably likely to reach Prospective Bidders.

3. Timing of advertising: Solicitation Documents should be released after or simultaneously with any required advertisement to ensure that Prospective Bidders learn about solicitations in a timely manner.

Solicitations should be advertised for at least 10 working days before the Bid Closing Time to ensure Prospective Bidders have enough time to generate Bids. For small value solicitations, however, the JBE may wish to consider a shorter advertising period. If a JBE adopts a shorter advertising period for small value solicitations, it should include details in its Local Contracting Manual.

**Note:** DGS's eProcurement system may require that an advertisement remain in the CSCR longer than 10 days. Other electronic bidding systems may have similar requirements. Buyers should confirm the advertisement end date if using these systems.

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<sup>1</sup> DGS's eProcurement system currently uses BidSync technology. JBEs may be required to register with BidSync to use certain features of DGS's eProcurement system.

4. Record of advertisement: A copy of the published advertisement should be included in the procurement file.

5. Resolicitations: A JBE conducting a resolicitation does not need to readvertise the solicitation if:

- The resolicitation occurs within three months of the publication of the original advertisement;
- Notice of resolicitation is provided to Prospective Bidders that requested and/or were sent the original Solicitation Document; and
- There is no material change to the solicitation.

6. Contract advertising exemption: JBEs can be granted an exemption from advertising by the Approving Authority or delegee when there is a compelling reason to do so. An exemption may be warranted if, for example, only one Prospective Bidder can supply the required goods or services and advertising would not produce more Prospective Bidders.

7. Advertising in the CSCR: The CSCR is a centralized listing of state procurements that DGS is required to publish by Government Code (GC) section 14825. The CSCR currently takes the form of an online database, accessed through DGS's eProcurement systems. Prospective Bidders are likely to see advertisements in the CSCR.

A JBE may submit an advertisement to the CSCR by using DGS Procurement Division's Internet web page ([www.pd.dgs.ca.gov](http://www.pd.dgs.ca.gov)), or by submitting Form STD 815 to DGS/Business Development Unit. DGS charges a fee for each advertisement that appears in the CSCR. There is an additional fee for advertisements that are not submitted electronically.

## E. Samples

The practice of obtaining samples from Prospective Bidders before contract award is not recommended. If sample goods are needed for review before award for demonstration or prepurchase testing, the Solicitation Document should:

- Explain that sample goods are required for demonstration or prepurchase testing;

- State that the JBE is not obligated for the cost of the sample goods or for their return; and
- Specify the quantities of the sample goods required.

Caution should be taken to ensure that a Bid does not contain terms or conditions that would result in the automatic purchase of the goods being tested.

## 4.2 SOLICITATION DOCUMENTS GENERALLY

The Solicitation Document sets forth the procurement process and includes the solicitation and contract requirements. It is the guiding document that ensures that Bidders are able to submit Responsive Bids and that the procurement is successful.

### A. Developing the Solicitation Document

Each Solicitation Document, regardless of format (Request for Quote (RFQ), Invitation for Bid (IFB), Request for Proposal (RFP)), should clearly state the needs or business requirements of the JBE in order for a Prospective Bidder to weigh associated risks and price the purchase.

1. Avoid writing restrictive requirements: JBEs should not include requirements in Solicitation Documents that restrict the bidding to a single Prospective Bidder. Buyers can avoid restrictive requirements by:

- Including only essential requirements;
- Avoiding restrictive, impractical, or nonessential requirements;
- Carefully checking delivery requirements to ensure that the turnaround time from a Bidder's receipt of order to delivery is not too restrictive or limiting;
- Defining requirements to promote and encourage Bidders to bid standard items or standard services where possible;
- Not specifying a particular brand name, product, or product feature that is peculiar to one manufacturer, except for reference purposes;
- Not dictating detailed design solutions prematurely; and
- Allowing sufficient time from the posting of the solicitation to the Bid Closing Time or first key action date to provide Prospective Bidders time to review and consider the requirements, prepare a Bid, and submit the Bid.

2. PCC 6611 Special Negotiation Process: If the procurement will include a special negotiation process (e.g., the use of supplemental bids), the Solicitation Document must provide appropriate details.

## B. Required Provisions

1. Bidder instructions: Each Solicitation Document should include instructions to Prospective Bidders detailing how to submit a Responsive Bid. A JBE may adopt a standard set of bidder instructions for use in its solicitations. If adopted, the standard set of bidder instructions should be included in the JBE's Local Contracting Manual.

2. General provisions: Each Solicitation Document should include the JBE's standard terms and conditions for the applicable type of purchase (non-IT goods, non-IT services, or IT goods and services). To the extent practicable, the JBE should include terms and conditions specific to that procurement, or simply attach the entire proposed contract including available appendices.

3. Protest information: Each Solicitation Document must include information regarding protest procedures, including relevant protest deadlines and where protests must be sent. If the JBE estimates that the procurement will be below the applicable protest threshold adopted by the JBE, the Solicitation Document must state that protests will not be accepted. For more information regarding protest thresholds, see chapter 7, section 7.2 of this Manual.

4. Common elements of RFPs and IFBs: All RFPs and IFBs must contain the following elements:

- A schedule of key dates, including the Bid Closing Time;
- Information on how Bids are to be submitted (e.g., sealed envelope with the solicitation number on the outside of the sealed package);
- Where Bids must be sent or delivered;
- Any attachments that are required to be returned by Bidders, such as administrative or technical requirements; and
- Evaluation information.

All RFPs and IFBs must also contain provisions addressing the following:

- Bidder conflict of interest (see PCC 10410–10411); and
- Antitrust claims (see GC 4552–4554).

5. Bidder signatures: For any written solicitation, regardless of dollar value, solicitation format, or delivery method (i.e., faxed, mailed, or delivered in person), Bids should include the signature of an authorized representative of the Bidder. Faxed or

electronic signatures are acceptable if allowed by the Solicitation Document. Of course, a faxed or electronic signature could not be used in any solicitation requiring a sealed bid as such bids must be delivered to the JBE in a sealed envelope.

**Note:** Bidder signatures are not required if the solicitation is conducted via e-mail or telephone, although the Buyer should document the name of the Bidder representative who provides the Bid.

6. Faxed bid responses: The following paragraph (or equivalent) must be included in all written solicitations when a JBE accepts faxed Bids:

Bids submitted by facsimile machine (fax) will be considered only if they are sent to [office fax number]. Bids sent to any other fax number will not be considered. The pages of the faxed bid received before the bid due date and time specified in the solicitation document will be considered “the complete bid.” Please be advised that there is a heavy demand placed on the fax machine receiving bids and the JBE assumes no responsibility if a bidder cannot transmit its bid via fax, or if the entire bid is not received before the bid due date and time.

**Note:** JBEs should consider adopting a solicitation value (e.g., \$10,000) above which faxed bids will not be accepted. JBEs may also consider limiting the acceptance of faxed Bids to solicitations conducted via telephone or e-mail. Any limit on faxed bids should be included in the JBE’s Local Contracting Manual.

7. Loss leader prohibition: Except as noted below, a JBE must include the following statement in every (i) non-IT goods Solicitation Document, (ii) non-IT services IFB or RFP that involves the furnishing of equipment, materials, or supplies, and (iii) IT goods or services RFP:

It is unlawful for any person engaged in business within this state to sell or use any article or product as a “loss leader” as defined in section 17030 of the Business and Professions Code.

**Exceptions:** The following acquisitions do not require loss leader language:

- Request for Offers (RFOs) for acquisitions from LPAs;
- Procurements using the SB/DVBE option; and
- Procurements under \$5,000.

8. Socioeconomic and environmental program language: JBEs are reminded to include socioeconomic and environmental program language in their solicitations, as applicable. If the DVBE incentive is waived, the Solicitation Document should state that the DVBE incentive is being waived. Refer to chapter 3 of this Manual for further information regarding socioeconomic and environmental programs, including circumstances in which JBEs may waive the DVBE incentive from individual competitive solicitations.

9. Tie bids: It is possible that two Bids will have the same cost (when a lowest responsible bidder approach is used) or receive the same score (when a highest scored bid approach is used). JBEs should include a tiebreaker provision in the Solicitation Document to address how the contract award will be made in the event of a tie. Examples of permissible tiebreakers are a coin toss or other similar objective method. The event must be observed by witnesses, and the affected Bidders should be invited to observe.

10. Warranty requirements: The Solicitation Document should specify any warranty requirements.

11. Shipping costs: For any procurement including goods (non-IT or IT), shipping costs must be addressed in the Solicitation Document.

12. Conflict Minerals: PCC 10490 places restrictions on procurements that include goods or services that involve certain “conflict minerals.” These minerals include cassiterite, columbite-tantalite, gold, and wolframite—minerals found in many technological products such as mobile telephones, laptop computers, and digital video recorders.

Scrutinized companies, as defined in PCC 10490(b), are ineligible to submit Bids to JBEs for procurements involving conflict minerals. Accordingly, if a JBE is conducting a procurement for goods or services that involves these minerals, the JBE should require each Bidder to certify either (i) it is not a “scrutinized company” as defined in PCC 10490(b), or (ii) the goods or services the Bidder would provide to the JBE are not related to products or services that are the reason the Bidder must comply with Section 13(p) of the Securities Exchange Act of 1934.<sup>2</sup>

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<sup>2</sup> PCC 10490(b) defines a “scrutinized company” as “a person that has been found to be in violation of Section 13(p) of the Securities Exchange Act of 1934 by final judgment or settlement entered in a civil or administrative action brought by the Securities and Exchange Commission and the person has not

13. Public Works Contracts and SB 854: Procurement and contracting for public works projects<sup>3</sup> involve significant requirements for JBEs and contractors relating to prevailing wage, including, but not limited to the following pursuant to SB 854 (Stat. 2014, Ch. 28):

- All bidders for public works contracts and their respective subcontractors must be registered with the Department of Industrial Relations (DIR).<sup>4</sup> A bid shall not be accepted nor any contract or subcontract entered into for a public works project without proof of the contractor or subcontractor's current registration with the DIR.<sup>5</sup>
- A PWC 100 form must be filed by a JBE with the DIR within five days of the award of a public works contract.<sup>6</sup> PWC 100 forms can be submitted electronically to the DIR at: <https://www.dir.ca.gov/pwc100ext/>
- Required provisions for bid documents and contracts for public works projects.<sup>7</sup>

Additional requirements relating to prevailing wage apply to public works projects, including their bid documents and contracts. If you would like further

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remedied or cured the violation in a manner accepted by the commission on or before final judgment or settlement." Section 13(p) of the Securities Exchange Act of 1934 requires certain entities to make disclosures concerning conflict minerals.

<sup>3</sup> Under the California Labor Code, public works include, for example, construction, alteration, demolition, installation, repair, or maintenance work that is paid for in whole or in part out of public funds (Labor Code §§ 1720(a)(1) and 1771). Public works also include, but are not limited to, carpeting (Labor Code § 1720(a)(5)), refuse hauling (Labor Code § 1720.3), and the assembly and disassembly of freestanding and affixed modular office systems (Labor Code § 1720(a)(1)).

**Note:** under PCC 19204(c), the California Judicial Branch Contract Law (JBCL) does not apply to procurement and contracting for trial court construction, including, but not limited to, the planning, design, construction, rehabilitation, renovation, replacement, lease, or acquisition of trial court facilities. However, under PCC 19204(c), the JBCL does apply to contracts for maintenance of all judicial branch facilities that are not under the operation and management of DGS. Therefore, information on SB 854 is being provided in this Manual pursuant to public works projects that are covered by the JBCL.

<sup>4</sup> Labor Code §§ 1771.1 and 1725.5.

<sup>5</sup> Labor Code § 1771.1(b). Please also note that under Labor Code § 1771.4(a)(2), the JBE awarding the contract shall post or require the prime contractor to post job site notices as prescribed by regulation. (For information on the current regulation, contact the DIR.)

<sup>6</sup> Labor Code § 1773.3.

<sup>7</sup> Labor Code §§ 1771.1(b) and 1771.4(a)(1).

[information, please contact the Judicial Council's Legal Services office, or visit the DIR's Public Works website \(http://dir.ca.gov/Public-Works/PublicWorks.html\)](http://dir.ca.gov/Public-Works/PublicWorks.html).<sup>8</sup>

### C. Amending a Solicitation Document

1. Clarifications or changes to a Solicitation Document: Clarifications or changes to a Solicitation Document are made by an addendum. An addendum should include at a minimum the following information:

- Addendum number;
- Solicitation title and number;
- Indication of where the clarification or change is made in the Solicitation Document (e.g., deleting and inserting pages); and
- Revised Bid Closing Time, or statement that the Bid Closing Time is unchanged.

A Solicitation Document may be modified before the Bid Closing Time. In the case of a modification resulting from a solicitation specifications protest, a Solicitation Document may be modified after the Bid Closing Time.

If the original solicitation was in written format, any addendum to the solicitation must be in writing. If the original solicitation was conducted by telephone, then the addendum may be communicated by telephone or in writing, at the Buyer's discretion. If the addendum is communicated by telephone, the addendum must be documented as part of the RFQ. All addenda become part of the procurement file.

**Note:** An addendum should be issued a reasonable time before the Bid Closing Time to allow Prospective Bidders sufficient time to prepare their Bids. If, in the Buyer's judgment, Prospective Bidders will need more time to submit a responsive Bid, then the Bid Closing Time should be extended in the addendum.

2. Evaluation criteria revisions: Evaluation criteria may not be changed after the Bid Closing Time.

### D. Multiple Awards for Services

JBEs may award multiple contracts for services through a single solicitation. This is useful, for example, when there are a variety of services or locations involved.

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<sup>8</sup> [This external link is being provided for general information purposes only. The Judicial Council does not warrant the accuracy, availability, or completeness of the information on the DIR website.](#)

The single solicitation must (i) have clear, concise descriptions of the work to be performed or goals and objectives to be achieved, (ii) state the intended number of awards,<sup>9</sup> and (iii) provide a clear objective standard on how awards will be made. The single solicitation should give Bidders sufficient information to be able to understand what is to be accomplished and to be able to budget accordingly.

### 4.3 BID HANDLING

1. Bid submissions: Generally, Bids are handled as follows:
  - When sealed Bids are required, each Bid must be separately sealed inside an envelope, signed (if required by the Solicitation Document), and received by the Bid Closing Time to be considered for award.
  - Bids must be kept in a secured area and remain confidential until bid opening.
  - Bids received after the Bid Closing Time are considered nonresponsive and must not be considered for award.<sup>10</sup>
  
2. Submission of bids by fax: Faxed bids should only be accepted when:
  - The Solicitation Document specifically states they will be allowed; and
  - They are received on the fax machine at the telephone number specified in the Solicitation Document.

The internal clock of the receiving fax machine is the clock by which the official time of receipt will be determined.

Any solicitation that requires a sealed Bid cannot be faxed.

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<sup>9</sup> The intended number of awards may be a range; for example, 2–4.

<sup>10</sup> A JBE may adopt, in its Local Contracting Manual, a requirement that late Bids be returned unopened to the applicable Bidder.

## 4.4 VENDOR SELECTION

### A. Vendor Selection Basics

The Evaluation Team should be composed of personnel familiar with the subject matter of the procurement, as well as applicable legal requirements. Each Evaluation Team member must:

- Be unbiased and able to evaluate all Bids fairly; and
- Withdraw from participating in an evaluation if he or she has or acquires a disqualifying interest.

An example of a disqualifying interest is where the Evaluation Team member's spouse is an employee of a Bidder.

Private consultants may not be voting members of the Evaluation Team. Private consultants may be used only to provide clarification or subject matter expertise to the Evaluation Team.

### B. No Bids

If no Responsive Bid is received from a Responsible Bidder, the Buyer has two options:

**Option 1:** The Buyer may cancel and reissue the solicitation, modifying any possible restrictive requirements. The Buyer should also consider methods to broaden the number of Bidders.

**Option 2:** If, in the opinion of the Buyer, a second solicitation would not result in a different outcome, the Buyer may cancel the solicitation and proceed with a sole source purchase following the requirements in chapter 5, section 5.9 of this Manual. If possible, the JBE should select as the sole source a responsible Bidder whose Bid was substantially technically compliant/responsive with the specifications.

**Note:** A JBE's ability to cancel a solicitation is not limited to situations where too few Bids were received. Before the Bid Closing Time, a JBE may cancel a solicitation for any or no reason. After the Bid Closing Time, all Bids may be rejected if the JBE determines that:

- The Bids received do not reflect effective competition;

- The cost is not reasonable;
- The cost exceeds the amount expected; or
- Awarding the contract is not in the best interest of the JBE.

### C. Required Certifications or Permits

The PCC requires JBEs to obtain certifications or permits in connection with certain purchases.

1. Darfur Contracting Act: Procurements for **non-IT goods or services** must address the requirements of the Darfur Contracting Act. The act is intended to preclude JBEs generally from contracting with “scrutinized companies” that do business in the African nation of Sudan (of which the Darfur region is a part), for the reasons stated in PCC 10475.

For acquisitions of non-IT goods or services, JBEs must require certain vendors to certify whether they are a “scrutinized company.” This applies regardless of the procurement approach used including, but not limited to: RFQs, RFPs, IFBs, and non-competitively bid procurements (except as specified below). The JBE may use the certification form contained in appendix A of this chapter, or develop its own form.

The only exception to JBEs obtaining this information is for contracts awarded using (i) an LPA, if the entity creating the LPA obtained a Darfur certification, or (ii) Intergovernmental Contracts (IGCs).

A scrutinized company is ineligible to submit a Bid for a contract with a JBE for non-IT goods or services. PCC 10478(a) requires a company that currently has (or within the previous three years has had) business activities or other operations outside of the United States to certify that it is not a scrutinized company in order to submit a Bid to a JBE. A scrutinized company may, however, submit a Bid to a JBE if the company first obtains permission from the JBE.

2. Iran Contracting Act: Procurements of non-IT goods, non-IT services, or IT goods and services of **one million dollars (\$1,000,000) or more** must address the requirements of the Iran Contracting Act. Generally speaking, the act is intended to place limits on transaction with entities that engage in certain investment activities in Iran, for the reasons stated in PCC 2201.

An entity is ineligible to bid on, submit a proposal for, enter into, or renew any contract with a JBE for goods or services of one million dollars (\$1,000,000) or more if the entity engages in investment activities in Iran, as defined in the act.

In addition, a financial institution is ineligible to bid on, submit a proposal for, enter into, or renew any contract with a JBE for goods or services of one million dollars (\$1,000,000) or more if the financial institution extends credit, as defined in the act, to a business identified on a list of ineligible vendors maintained by DGS (Iran List).

Prior to submitting a bid or proposal and prior to executing any JBE contract or renewal for goods or services of one million dollars (\$1,000,000) or more, an entity must certify that it is not on the Iran List. Also, financial institutions must certify that they are not extending credit to an ineligible vendor as described in the act. This certification requirement applies regardless of the procurement approach, method, or solicitation format used, including RFPs, IFBs, RFQs, and non-competitively bid procurements. The act provides exceptions to the certification requirement; see PCC 2203(c) and (d) for additional information regarding the exceptions.

This sample certification in Attachment B may be used to satisfy the act's certification requirements.

3. Purchases of Tangible Personal Property: If a purchase includes tangible personal property, the Vendor must submit to the JBE, for itself and each of its affiliates that make sales for delivery into California, a copy of either:

- A California seller's permit issued under Revenue and Taxation Code section 6066 and following; or
- A certificate of registration issued under Revenue and Taxation Code section 6226.

The Vendor must submit this documentation before a contract is executed.

There are two exemptions to this requirement:

- Purchases of \$2,500 or less if the JBE is using a credit card to pay for the purchase (**note**: the total amount allowed under this exception for each Vendor per year is \$7,500 per JBE); and
- Purchases where the Approving Authority, or his or her delegee, makes a written finding that the contract is necessary to meet a "compelling state

interest.” “Compelling state interests” include ensuring the provision of essential services, ensuring the public health, safety, and welfare, and responding to an emergency, as that term is defined in PCC 1102.

The JBE should inform Bidders of this requirement in applicable Solicitation Documents. Alternately, the JBE may require all Bidders to submit this documentation with their Bids in applicable solicitations.

**Note:** Depending on the specific situation, computer software may constitute “tangible personal property” for purposes of this section. Software is considered tangible personal property if (i) the software is transmitted to the JBE on a CD-ROM or other tangible medium, or (ii) the software includes a printed user’s manual or other physical accessory. Software is not considered tangible personal property if (i) the software is transmitted to the JBE via the Internet, and (i) no tangible medium, printed manual, or other physical accessory is included with the software.

4. Document the file: If a Bidder or Bid is rejected due to ineligibility, the procurement file should be documented identifying the reason, with a printout of the supporting documentation.

#### **D. Deviations**

The JBE may reject any or all Bids, or parts thereof, and may waive any immaterial deviation or defect in a Bid. The JBE's waiver of any immaterial deviation or defect in no way modifies the Solicitation Documents or excuses the Bidder from full compliance with the solicitation specifications if awarded the contract.

1. Waiving mandatory requirements is prohibited: Mandatory requirements include those required by applicable law. Material deviations of mandatory requirements cannot be waived, and any Bid containing such deviations must be rejected. All such deviations must be documented in the procurement file to support the rejection.

2. Determining whether a deviation is material: JBEs should evaluate Bids by first determining that each Bid is responsive to the solicitation requirements. A deviation from a requirement or a defect is material if, in the opinion of the JBE, the affected Bid:

- Is not in substantial accord with the solicitation requirements;
- Provides an advantage to one Bidder over other Bidders in any way (such as reducing the cost of providing the goods or services); or

- Has a potentially significant effect on the delivery, quantity, or quality of items bid, amount paid to the Vendor, or the cost to the JBE.

3. Immaterial deviation: A Bid that substantially conforms to the requirements set forth in a Solicitation Document, but is not strictly responsive, may be accepted if the variance cannot have affected the amount of the Bid or given the Bidder an advantage or benefit not allowed other Bidders. In other words, if the variance is inconsequential, the Bid may still be accepted.

**Example:** A Bidder referenced the wrong page in its supporting technical literature. The Bidder directed the Evaluation Team to page 4 and the correct page was page 5.

4. Material deviation: A material deviation affects the amount of the Bid or provides an advantage or benefit not allowed other Bidders. A material deviation typically affects the cost, quantity, or quality of the product or services to be provided to the JBE.

**Example:** The solicitation required a telephone system that would serve 500 users and the Bidder offered a system that would serve 250 users.

5. JBE discretion: The JBE, in its sole discretion, will determine what constitutes a material deviation from a mandatory requirement.

## E. Tax Delinquents

Pursuant to PCC 10295.4, a JBE shall not enter into any contract for the acquisition of **non-IT goods or services** with a person or entity identified by the Franchise Tax Board (FTB) or the Board of Equalization (BOE) as one of the 500 largest tax delinquents. Any contract entered into in violation of PCC 10295.4 is void and unenforceable.

Before executing any contract or renewal for non-IT goods or services, the JBE should verify that the contractor is not on either of the following lists:

FTB list: [www.ftb.ca.gov/aboutFTB/Delinquent\\_Taxpayers.shtml](http://www.ftb.ca.gov/aboutFTB/Delinquent_Taxpayers.shtml)

BOE list: [www.boe.ca.gov/cgi-bin/deliq.cgi](http://www.boe.ca.gov/cgi-bin/deliq.cgi)

This requirement applies regardless of the procurement approach, method, or solicitation format used, including: RFPs, IFBs, RFQs, and non- competitively bid procurements.

#### **4.5 REVERSE AUCTIONS**

JBEs may use a “reverse auction” for the acquisition of non-IT goods, non-IT services, or IT goods and services. A reverse auction is a competitive online solicitation process for fungible goods or services in which Bidders compete against each other online in real time in an open and interactive environment.

Any reverse auction process used by a JBE must comply with the following:

- The reverse auction documentation must specify (i) the date and time when the JBE will start accepting online Bids, and (ii) the date and time when the JBE will stop accepting online Bids;
- Prospective Bidders must register before the reverse auction opening date and time;
- Prospective Bidders must agree to any terms and conditions and other requirements of the solicitation;
- All Bids must be posted online and be updated on a real-time basis;
- Bidders must be allowed to lower their Bids below the lowest currently-posted bid; and
- Bids must be accepted until the specified closing date and time.

A JBE may require Prospective Bidders to be prequalified prior to placing Bids in a reverse auction. A JBE may adopt other policies respecting reverse auctions in its Local Contracting Manual.

#### **4.6 FOLLOW-ON CONTRACTING**

A Vendor may, as part of the consulting services provided to a JBE, recommend or suggest the purchase of certain goods or services. This is common when, for example, the JBE contracts with a Vendor to create a feasibility study. No Vendor (or subsidiary thereof) that makes such a recommendation may submit a Bid or be awarded a contract to provide those goods or services to the JBE. In addition, no Vendor may be paid out of JBE funds for developing recommendations on the acquisition of IT goods or services or assisting in the preparation of a feasibility study, if that Vendor is to be a source of such acquisition or would otherwise directly and/or materially benefit from the JBE’s adoption of such recommendations or the course of action recommended in the feasibility study.

This “follow-on” prohibition does not extend to Vendors that were awarded a subcontract of the original consulting services contract that amounted to no more than 10 percent of the total monetary value of the consulting services contract. To determine

whether a follow-on situation exists, the JBE should examine the initial and subsequent contracts.

Analysis of the initial contract: The first step is determining whether the initial contract is for consulting services. If it is not, the prohibitions above do not apply. The essential issue is what the Vendor delivers, not how it is labeled. The following questions may prove helpful:

- Are consulting services present?
- Does the contract call for services that are advisory in nature, providing a recommended course of action or personal expertise and having an end product that transmits information or analysis related to the governmental functions of a JBE?

Determining whether certain IT-related contracts constitute consulting services contracts can be difficult. For reference, the following are examples of what are typically or not typically considered consulting services in the IT area:

1. IT contracts typically considered as consulting services contracts:
  - Feasibility study;
  - Strategic planning and business process reengineering/improvement (not included in the lifecycle of an IT project); and
  - Maintenance and operations.
2. IT contracts typically not considered as consulting services contracts:
  - Design development and implementation;
  - Project management;
  - Independent validation and verification; and
  - Independent project oversight consultant.
3. IT contracts that require analysis of the specific details of the contract to determine whether or not it is a consulting services contract:
  - Acquisition specialist.

Analysis of the subsequent contract: If the initial contract is determined to be a consulting services contract, determine the causal relationship, if any, between the initial contract and the subsequent contract. The purpose of the causal inquiry is to determine whether there is a sufficient link between the end product(s) of the first contract and the deliverable(s) to be procured by the second contract to warrant

preclusion of the Vendor that performed the first contract. In general, if there is a causal relationship, the JBE must reject the Prospective Bidder or withhold the award of a contract. Consultation with legal counsel is recommended before the JBE decides either to reject a Prospective Bidder or to withhold an award of a contract.

#### **4.7 SUMMARY DOCUMENT**

The evaluation and selection process for every procurement effort should be documented and referenced in a procurement summary. The purpose of the procurement summary is to create a single document that provides the history of a particular procurement transaction and explains the significant facts, events, and decisions leading up to the contract execution. The procurement summary should be included in the procurement file.

Procurement summaries should be written clearly and concisely to support the soundness of the purchasing decision.

Procurement summary information includes but is not limited to:

- Documenting the prices offered by the Bidders;
- Documenting that the selection process occurred in accordance with the Solicitation Document;
- Determining that the selected Bidder is responsible and the Bid is responsive; and
- Attaching the scoring sheets, if applicable.

**APPENDIX A**

**DARFUR CONTRACTING ACT CERTIFICATION**

Pursuant to Public Contract Code (PCC) section 10478, if a bidder or proposer currently or within the previous three years has had business activities or other operations outside of the United States, it must either (i) certify that it is not a “scrutinized company” as defined in PCC 10476, or (ii) receive written permission from the [JBE] to submit a bid or proposal.

To submit a bid or proposal to the [JBE], the proposer/bidder must insert its company name and Federal ID Number below and complete **ONLY ONE** of the following three paragraphs. To complete paragraph 1 or 2, simply check the corresponding box. To complete paragraph 3, check the corresponding box **and** complete the certification for paragraph 3.

<i>Company Name (Printed)</i>	<i>Federal ID Number</i>
<i>Printed Name and Title of Person Checking Box (for paragraph 1 or 2 below)</i>	

1. We do not currently have, and we have not had within the previous three years, business activities or other operations outside of the United States.

**OR**

2. We are a “scrutinized company” as defined in PCC 10476, but we have received written permission from the [JBE] to submit a bid or proposal pursuant to PCC 10477(b). *A copy of the written permission from the [JBE] is included with our bid or proposal.*

**OR**

3. We currently have, or we have had within the previous three years, business activities or other operations outside of the United States, but we **certify below** that we are not a “scrutinized company” as defined in PCC 10476.

**CERTIFICATION FOR PARAGRAPH 3:**

I, the official named below, CERTIFY UNDER PENALTY OF PERJURY, that I am duly authorized to legally bind the proposer/bidder to the clause in paragraph 3. This certification is made under the laws of the State of California.

<i>Company Name (Printed)</i>	<i>Federal ID Number</i>
<i>By (Authorized Signature)</i>	
<i>Printed Name and Title of Person Signing</i>	
<i>Date Executed</i>	<i>Executed in the County of _____ in the State of _____</i>

**APPENDIX B****IRAN CONTRACTING ACT CERTIFICATION**

Pursuant to Public Contract Code (PCC) section 2204, you must complete this Iran Contracting Act certification when (i) submitting a bid or proposal to the [JBE] for a solicitation of goods or services of \$1,000,000 or more, or (ii) entering into or renewing a contract with the [JBE] for the purchase of goods or services of \$1,000,000 or more.

To submit a bid or proposal to, or enter into or renew a contract with, the [JBE], you must complete **ONLY ONE** of the following two paragraphs. To complete paragraph 1, check the corresponding box **and** complete the certification for paragraph 1. To complete paragraph 2, simply check the corresponding box.

1. We are not on the current list of persons engaged in investment activities in Iran created by the California Department of General Services (“DGS”) pursuant to PCC 2203(b), and we are not a financial institution extending \$20,000,000 or more in credit to another person, for 45 days or more, if that other person will use the credit to provide goods or services in the energy sector in Iran and is identified on the current list of persons engaged in investment activities in Iran created by DGS.

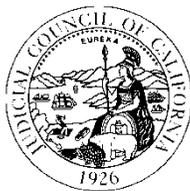
**OR**

2. We have received written permission from the [JBE] to submit a bid or proposal, or enter into or renew a contract, pursuant to 2203(c) or (d). *A copy of the written permission from the [JBE] is included herewith.*

**CERTIFICATION FOR PARAGRAPH 1:**

I, the official named below, certify that I am duly authorized to legally bind the proposer/bidder/vendor to the clause in paragraph 1. This certification is made under the laws of the State of California.

<i>Company Name (Printed)</i>		<i>Federal ID Number</i>
<i>By (Authorized Signature)</i>		
<i>Printed Name and Title of Person Signing</i>		
<i>Date Executed</i>	<i>Executed in the County of _____ in the State of _____</i>	



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 4A  
Page 1 of 12

## STEP-BY-STEP GUIDE FOR THE PROCUREMENT OF NON-IT GOODS

### CHAPTER 4A

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## **INTRODUCTION**

The most significant change to Judicial Branch Entity (JBE) procurement required by the California Judicial Branch Contract Law is that JBEs must procure non-IT goods above a threshold amount (\$25,000, unless a higher amount is established by the JBE's Approving Authority) using a "lowest responsible bidder" methodology rather than a "best value" or "highest scoring bidder" approach. JBEs can no longer use these other approaches to procure non-IT goods valued above the threshold amount.

This chapter sets forth a step-by-step guide that Buyers can use when competitively soliciting non-IT goods.<sup>1</sup> For noncompetitive solicitation of non-IT goods, see chapter 5 of this Manual.

## **DEFINED TERMS**

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

## **STEP 1—DETERMINE THE PROCUREMENT VALUE**

The value of the procurement directly affects the processes to be used in the procurement. The JBE employee requesting the procurement should estimate the total value of the procurement, including:

- Value of the non-IT goods to be procured;
- Value of any associated incidental services (such as installation);
- Delivery costs;
- Taxes (if applicable); and
- Other associated costs, as applicable.

JBEs may not split a single transaction into a series of transactions for the purpose of evading procurement requirements.

See section A in the "Selected Topics Relevant to Solicitations of Goods" section below for additional information on incidental services acquired in connection with the procurement of non-IT goods.

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<sup>1</sup> This step-by-step guide may be superseded in whole or in part if a JBE uses a special negotiation process. For more information regarding special negotiation processes, see chapter 2, section 2.1.H of this Manual.

**STEP 2—DEVELOP LIST OF PROSPECTIVE BIDDERS**

The JBE employee requesting the procurement should develop a list of Prospective Bidders. See chapter 4, section 4.1.B of this Manual for additional information on developing a list of Prospective Bidders.

**STEP 3—ASSEMBLE PROCUREMENT TEAM**

The Buyer, with assistance from the JBE employee requesting the procurement, should identify additional JBE personnel who will be involved in the procurement. This may include:

- Personnel to help develop the Solicitation Document;
- Evaluation Team members; and
- Legal counsel, if applicable. (See chapter 8, section 8.4.B of this Manual for more information on legal review of contracts.)

If required by the Local Contracting Manual, the Buyer should have these personnel sign confidentiality/conflict statements. See chapter 4, section 4.1.C of this Manual for additional information on confidentiality/conflict statements.

**STEP 4—SELECT SOLICITATION DOCUMENT TYPE**

Two types of Solicitation Documents are used in the procurement of non-IT goods:

- Requests for Quote (RFQs); and
- Invitations for Bid (IFBs).

See the table below for information about when each type of Solicitation Document should be used.

Solicitation Document	Procurement Size	Description
RFQ	Up to \$50,000 <sup>2</sup>	Used for straightforward, uncomplicated, and low-risk procurements.

<sup>2</sup> A JBE may adopt a higher or lower threshold for the use of RFQs in its Local Contracting Manual. If the JBE adopts a higher threshold, the JBE must ensure that (i) the higher threshold is reasonable and appropriate, and (ii) the JBE provides adequate oversight for the use of larger-value RFQs. Also, note that procurements under \$5,000 may be conducted without a competitive solicitation; see chapter 5, section 5.1 of this Manual.

Solicitation Document	Procurement Size	Description
		<i>Note: Cannot be used if incidental services included in the purchase (e.g., set-up, installation) exceed \$4,999.99, unless an exemption is granted. See section A in the “Selected Topics Relevant to Solicitations of Goods” section below for additional information.</i>
IFB	Any size	Used for more complicated, higher risk, and higher value procurements.

**Note:** The JBE may use other names for these Solicitation Documents; it does not need to refer to or title them as “RFQs” or “IFBs.”

## STEP 5—DRAFT SOLICITATION DOCUMENT

The Buyer should draft the final Solicitation Document. For requirements applicable to Solicitation Documents, see chapter 4, section 4.2 of this Manual.

In addition to the required provisions identified in chapter 4 of this Manual, a Solicitation Document for non-IT goods must comply with the following requirement:

- Product specifications must not be written with the intent of excluding goods manufactured, produced, grown, or otherwise originating in California (see PCC 10302.6).

The following subsections provide additional information useful in drafting the two types of Solicitation Documents.

### A. RFQs

An RFQ is used for straightforward procurements where Bids may be solicited by telephone or another method of electronic communication. If the Buyer solicits Bids by telephone, the Buyer must prepare and use a script (a narrative of the Bid requirements) so that each Prospective Bidder receives the same information and Bids may be evaluated fairly. Similarly, if the Buyer solicits Bids by e-mail or another written

manner, the Buyer must send the same information to each Prospective Bidder so that Bids may be evaluated fairly.

The RFQ should:

- Be short, concise, and to the point;
- Include a general description of the non-IT goods to be solicited;
- Include quantities of the non-IT goods to be solicited;
- Include any required features of the non-IT goods to be solicited;
- Specify when the non-IT goods must be delivered;
- Specify how the Prospective Bidder must deliver its Bid (e.g., by telephone, e-mail, fax, etc.); and
- Include bidder instructions and applicable general provisions associated with the purchase, or a reference to the web page containing these, if applicable.

## B. IFBs

The IFB must include the JBE's standard terms and conditions for the acquisition of non-IT goods. The JBE should also distribute with the IFB the terms and conditions specific to the procurement, or simply attach the entire proposed contract, including available appendices. The IFB should state that any material exception (addition, deletion, or other modification) to the JBE's terms and conditions will render a Bid nonresponsive. Note that the JBE, in its sole discretion, will determine what constitutes a material exception.

The IFB must state the time and place Bids will be publicly opened. This place must be accessible to Bidders and other members of the public, and may be at the JBE's facilities.

## STEP 6—PREPARE ADVERTISING

A JBE must advertise any solicitation of non-IT goods **in excess of \$50,000**.<sup>3</sup> See chapter 4, section 4.1.D of this Manual for advertising methods.

Because the advertisement should be released before or simultaneously with the Solicitation Document, the Buyer should prepare any necessary advertisement in conjunction with the Solicitation Document.

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<sup>3</sup> All solicitations of non-IT goods in excess of \$50,000 must be advertised, even if the JBE adopts a threshold for use of RFQs that is higher than \$50,000.

**Note:** If incidental services included in the purchase (e.g., set-up, installation) exceed \$4,999.99, the solicitation must be advertised even if the total estimated value of the solicitation is under \$50,000. See section A in the “Selected Topics Relevant to Solicitations of Goods” section below for information regarding exemptions to this requirement.

## **STEP 7—RECEIVE BIDS**

Bids are received and handled as described in chapter 4, section 4.3 of this Manual. Some aspects of receiving Bids depend on the type of Solicitation Document used.

### **A. RFQs**

Bids must be submitted as specified in the RFQ. The Buyer should document all Bids received and retain the documentation in the procurement file. In addition, the RFQ (script, e-mail, or other writing) should be retained in the procurement file.

Bids received pursuant to an RFQ solicitation remain confidential until a contract is executed.

### **B. IFBs**

Bids must be submitted in sealed envelopes. A JBE should time/date stamp Bids as they are received.

Bids received pursuant to an IFB solicitation remain confidential until the Bids are publicly opened.

## **STEP 8—OPEN BIDS**

All Bids in response to IFBs must be publicly opened at the time and place specified in the IFB. If any person present at the opening requests that the Bids be read, the Buyer (or designee) must read the Bids aloud. Once opened, the Bids must be made available for public inspection.

**Note:** Because RFQs do not involve sealed Bids, this step is inapplicable to solicitations using RFQs.

## STEP 9—DETERMINE IF COMPETITION HAS BEEN ACHIEVED

Two methods are used to determine whether competition has been achieved: one for RFQs and another for IFBs.

### A. RFQs

If a Buyer obtains a single Bid, and the Buyer determines that the Bid is fair and reasonable, the Buyer does not need to obtain additional Bids. If a Buyer obtains a single Bid, and the Buyer determines that the Bid is not fair and reasonable, the Buyer should obtain at least one additional Bid.

### B. IFBs

The Buyer should make reasonable efforts to obtain at least two Responsive Bids from Responsible Bidders. Advertising the solicitation constitutes a reasonable effort.

## STEP 10—BID CLARIFICATION

If the JBE requires clarification regarding a Bid, the JBE should contact the Bidder that submitted the affected Bid.

## STEP 11—EVALUATE BIDS

The Evaluation Team must evaluate the Bids using the criteria specified in the Solicitation Document. The requirements in this step are in addition to the general requirements set forth in chapter 4, section 4.4 of this Manual.

A Bidder's exception to the JBE's terms or conditions (addition, deletion, or other modification) may constitute a material deviation. A Bid with a material deviation is nonresponsive. JBEs have discretion to determine materiality.

For ease of reference, the following definitions are excerpted from the glossary:

- **Responsible Bidder** means a Bidder that possesses the required experience, facilities, and financial resources and is fully capable of performing the relevant contract.
- **Responsive Bid** means a Bid that complies with the requirements of the Solicitation Document and the terms and conditions of the proposed contract without material deviation.

**Note:** For purposes of determining the lowest Bid, the amount of sales tax must be excluded from the total amount of the Bid (PCC 10301). See chapter 3 of this Manual for more information regarding preferences, incentives, and discounts. See chapter 4, section 4.4.D of this Manual for guidance on determining whether a deviation is material.

## A. RFQs

Under PCC 10301, JBEs must award contracts for non-IT goods above a threshold amount to the lowest responsible bidder. The default threshold amount is \$25,000, but the Approving Authority may establish a higher threshold amount for his or her JBE.<sup>4</sup> If the Approving Authority establishes a higher threshold amount, the JBE should document this higher threshold amount in its Local Contracting Manual.

RFQs less than the threshold amount: JBEs are not statutorily required to award the contract to the lowest responsible bidder if the JBE has a valid business reason to do otherwise.

RFQs equal to or above the threshold amount: The JBE must award the contract, if at all, to the **Responsible Bidder** that submitted the lowest **Responsive Bid** after application of any preference, incentives, or discounts, if applicable.

## B. IFBs

The JBE must award the contract, if at all, to the **Responsible Bidder** that submitted the lowest **Responsive Bid** after application of any preference, incentives, or discounts, if applicable.

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<sup>4</sup> PCC 10301 allows the director of the Department of General Services (DGS) to establish a higher threshold amount applicable to procurements of non-IT goods by state agencies. Within the executive branch, purchasing authority resides primarily with DGS (see, e.g., *State Contracting Manual*, volume 2, section 1.A1.0). Within the judicial branch, however, each JBE possesses its own purchasing authority (see chapter 1, section 1.1.A of this Manual). Accordingly, the authority to establish a higher threshold amount for a JBE resides in the Approving Authority of that JBE. If the Approving Authority establishes a higher threshold amount, the Approving Authority must ensure that (i) the higher threshold amount is reasonable and appropriate, and (ii) the JBE provides adequate oversight for procurements conducted pursuant to the higher threshold amount.

## STEP 12—NOTICE OF INTENT TO AWARD

### A. RFQs

When using an RFQ, the JBE is not required to post a notice of intent to award.

### B. IFBs

There are both posting and notification requirements when using an IFB.

#### 1. Posting

The JBE must post a “notice of intent to award” on its website or in a public place in the offices of the JBE at least 24 hours before the contract is awarded. Once the notice has been posted, the time for submitting a protest begins to count down.

**Exception:** The JBE does not need to post a notice of intent to award if (i) the JBE has adopted a protest threshold applicable to non-IT goods, and (ii) the procurement is below that protest threshold. For more information regarding protest thresholds, see chapter 7, section 7.2 of this Manual.

#### 2. Notification

If the contract will be awarded to a Bidder that did not submit the lowest Bid (because, e.g., the lowest Bid was not a Responsive Bid, or the Bidder that submitted the lowest Bid was not a Responsible Bidder), the JBE must notify the lowest Bidder at least 24 hours before awarding the contract. The 24-hour period excludes Saturdays, Sundays, and legal holidays. If the lowest Bidder submits a valid protest, the JBE must not make an award until either the protest has been withdrawn or the JBE’s protest hearing officer has responded to the protest. For more information regarding protest procedures, see chapter 7 of this Manual.

## STEP 13—CREATE THE CONTRACT

The Buyer should memorialize the purchase using a contract. Unless a purchase order is used, the contract must be signed by an authorized representative of the Bidder who can bind the Bidder contractually.

**STEP 14—CREATE THE PROCUREMENT SUMMARY DOCUMENT**

The Buyer should create a procurement summary document and place it in the procurement file. For more information on procurement summary documents, see chapter 4, section 4.7 of this Manual.

**STEP 15—NOTICES OR REVIEWS**

The JBE must complete any required notices or reviews. See chapter 2, section 2.2 of this Manual for additional details.

**SELECTED TOPICS RELEVANT TO SOLICITATIONS OF GOODS****A. Incidental Services**

Unless an exemption is granted, incidental services included with the purchase of non-IT goods:

- May not exceed \$4,999.99, and
- Should be directly related to the purchase of non-IT goods, such as setup or installation.

Unless an exemption is granted, the solicitation must be advertised if the value of incidental services included in the purchase exceeds \$4,999.99, even if the total estimated value of the solicitation is under \$50,000.

The Approving Authority, or his or her delegee, may grant an exemption to these requirements if he or she determines, in his or her sole discretion, that the cost of complying with the requirement will likely exceed the savings generated by complying with the requirement.

**B. Motor Vehicles**

In establishing specifications for the purchase of a motor vehicle, and in determining the lowest responsible bidder, a JBE may consider the probable resale value of the vehicle as determined by:

- Recognized published used car marketing guides;
- Other established historical evidence of future used motor vehicle value; or

- Contractual guarantee of the apparent low Bidder that the resale value of the vehicle will be no less in proportion to Bid price than any other comparable vehicle complying with specifications for which a Bid was received.

Under Public Resources Code (PRC) section 25722.7, fleet vehicle purchases by JBEs must meet minimum fuel economy standards. Under PRC 25722.7(a) and (b), fleet vehicle purchases must meet the fuel economy standard in section 3620.1 of the *State Administrative Manual (SAM)*, which sets forth a minimum miles per gallon standard for the combined annual purchases of vehicles by each JBE. Please refer to PRC 25722.7 and SAM 3620.1 for further information.

### **C. Solicitations of Printer or Copier Cartridges**

If a JBE procures printer or copier cartridges, it must include a statement on the cover of the Solicitation Document (or in some other prominent place in the Solicitation Document) informing Bidders that it is unlawful to prohibit a printer or copier cartridge that is sold to a JBE from being recycled or remanufactured, except as noted below.

**Exception:** This requirement does not apply where the Bidder enters into signed agreements with its customers consenting to the return of the used cartridge to the Bidder for (a) recycling and remanufacturing, or (b) recycling.



# Judicial Council of California

Judicial Branch Contracting Manual

Chapter 5  
Page 1 of 10

## NON-COMPETITIVELY BID (NCB) PROCUREMENTS

### CHAPTER 5

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## **INTRODUCTION**

In certain circumstances, Judicial Branch Entities (JBEs) may procure non-IT goods, non-IT services, and IT goods and services without going through a competitive process (advertising, receiving Bids, etc). In these non-competitively bid (NCB) procurements, a single entity is afforded the opportunity to provide the specified non-IT goods, non-IT services, or IT goods and services.

The following are the categories of allowed NCB procurements:

- Purchases under \$5,000;
- Emergency purchases;
- Purchases from governmental entities;
- Legal services;
- Certain Leveraged Procurement Agreements (LPAs);
- Purchases from a business entity operating a Community Rehabilitation Program (CRP);
- Licensing or proficiency testing examinations;
- Subvention and local assistance contracts; and
- Sole source.

This chapter explains when NCB procurements are allowed and the processes required in conducting an NCB procurement.

## **DEFINED TERMS**

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

### **5.1 PURCHASES UNDER \$5,000**

For very small purchases, NCB procurements are permitted because the cost of conducting a competitive procurement may exceed the savings expected from the competitive process.

JBEs may purchase non-IT goods, non-IT services, or IT goods and services that cost less than \$5,000 without conducting a competitive procurement so long as the Buyer determines that the pricing is fair and reasonable.

The Buyer should include documentation on fair and reasonable pricing in the procurement file. Unless otherwise required by the JBE's Local Contracting Manual, no other documentation or approval is required.

**Note:** JBEs may not split a single transaction into a series of transactions for the purpose of evading competitive solicitation requirements.

**Note:** Although not required to do so, JBEs may competitively solicit Bids for purchases under \$5,000. An RFQ is usually used for such procurements.

## 5.2 EMERGENCY PURCHASES

In the event of an emergency, JBEs may purchase non-IT goods, non-IT services, or IT goods and services of any value without conducting a competitive procurement.

An emergency procurement must be approved in writing by the Approving Authority or his or her delegee. The Approving Authority (or delegee) may approve an emergency procurement only if he or she determines that immediate acquisition is necessary for the protection of the public health, welfare, or safety.<sup>1</sup>

When completing an emergency purchase, the Buyer should include in the procurement file the following information:

- A description of the emergency;
- A description of the non-IT goods, non-IT services, or IT goods and services to be purchased, and their prices;
- The names and quotations of suppliers contacted; and
- A copy of the written approval.

## 5.3 PURCHASES FROM GOVERNMENTAL ENTITIES

JBEs may purchase non-IT goods, non-IT services, and IT goods and services of any value from other governmental entities without conducting a competitive procurement.

**Note:** The procurements covered by this section are those in which the governmental entity directly sells the non-IT goods, non-IT services, or IT goods or services to the

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<sup>1</sup> For purchases of non-IT services, the Approving Authority (or delegee) may also approve an emergency procurement if he or she determines that immediate acquisition is necessary for the protection of state property.

JBE. This situation is distinct from when a governmental entity has signed an LPA with a Vendor and allows the JBE to purchase from that Vendor using the LPA. For more information on LPAs, see section 5.5 below.

The Buyer should note in the procurement file that the purchase is being made from a governmental entity. Unless otherwise required by the JBE's Local Contracting Manual, no other documentation or approval is required.

**Note:** Contracts with governmental entities cannot be used to circumvent bidding requirements (see, e.g., PCC 10340(b)(3)).

**Note:** For purposes of this chapter, a "governmental entity" includes, without limitation, (i) a governmental agency from California or any state, (ii) a state college or state university from California or any state, (iii) a local governmental entity or agency, including those created as a joint powers authority, and local governmental entities from other states, (iv) an auxiliary organization of the California State University, or a California community college, (v) the federal government, (vi) a foundation organized to support the Board of Governors of the California Community Colleges, or (vii) an auxiliary organization of the Student Aid Commission established under Education Code section 69522.

#### **5.4 LEGAL SERVICES**

JBEs may purchase legal services of any value without conducting a competitive procurement. Legal services include:

- Services performed by an attorney or an attorney's staff; and
- Services performed by consultants and expert witnesses in connection with pending or anticipated legal proceedings.

The Buyer should note in the procurement file that the purchase is for legal services. Unless otherwise required by the JBE's Local Contracting Manual, no other documentation or approval is required.

#### **5.5 CERTAIN LPAs**

If a JBE procures non-IT goods, non-IT services, or IT goods and services in accordance with chapter 6 of this Manual through an LPA established by such JBE or another entity, the JBE may procure such goods or services without having to conduct its own competitive bidding.

## **5.6 COMMUNITY REHABILITATION PROGRAMS (CRPs)**

JBEs may purchase non-IT goods, non-IT services, and IT goods and services of any value from a business entity operating a CRP without conducting a competitive procurement, provided that the goods or services meet the specifications and needs of the JBE and are purchased at a fair market price as determined by the JBE.

**Note:** The CRP must meet the criteria established by Welfare and Institutions Code section 19404 in order for the JBE to purchase from the CRP. To confirm compliance, the JBE should request a copy of the CRP's approval certificate, issued by the Department of Rehabilitation.

The Buyer should note in the procurement file the purchase is being made from a CRP. The JBE should document its procurement file to support that the price offered by a CRP is fair and reasonable.

## **5.7 LICENSING OR PROFICIENCY TESTING EXAMINATIONS**

JBEs may purchase non-IT services of any value related to the development, maintenance, administration, or use of licensing or proficiency testing examinations, without conducting a competitive procurement.

The Buyer should note in the procurement file that the purchase is for licensing or proficiency testing examinations. Unless otherwise required by the JBE's Local Contracting Manual, no other documentation or approval is required.

## **5.8 SUBVENTION AND LOCAL ASSISTANCE CONTRACTS**

These are contracts providing assistance to local governments and aid to the public directly or through an intermediary, such as a nonprofit corporation organized for that purpose. JBEs may enter into subvention and local assistance contracts without conducting a competitive procurement.

The Buyer should note in the procurement file that the contract is a subvention or local assistance contract. Unless otherwise required by the JBE's Local Contracting Manual, no other documentation or approval is required.

## **5.9 SOLE SOURCE**

JBEs may purchase non-IT goods, non-IT services, and IT goods and services of any value without conducting a competitive procurement if (i) the goods, services, or goods

and services are the only non-IT goods, non-IT services, or IT goods and services that meet the JBE's need, or (ii) a grant application submittal deadline does not permit the time needed for a competitive procurement of services.

**Example:** A JBE needs to purchase a replacement fuse. The JBE's electrical systems are quite old, and only one entity currently manufactures the type of fuse that is needed. The JBE may purchase the fuse from that entity as a sole source.

**Example:** A JBE needs a piece of software customized. Only one entity has the intellectual property rights necessary to alter the software and license the resulting modifications to the JBE. The JBE may contract with that entity as a sole source.

A sole source request must be provided to the sole source approver.

The sole source request should include the following information:

- Description of the non-IT goods, non-IT services, or IT goods and services to be procured;
- Explanation of why the non-IT goods, non-IT services, or IT goods and services cannot be procured competitively;
- The effort made to solicit competitive Bids, if any;
- Documentation that the pricing offered is fair and reasonable; and
- Special factors affecting the cost or other aspect of the procurement, if any.

The sole source approver is:

- The Approving Authority;
- The delegee of the Approving Authority; or
- Another person identified as the sole source approver in the JBE's Local Contracting Manual.

The sole source approver approves or denies the sole source request. If the sole source approver approves the sole source request, the Buyer should conduct the procurement as proposed. If the sole source approver denies the sole source request, the Buyer will either cancel the procurement or conduct a competitive solicitation to acquire the same or equivalent non-IT goods, non-IT services, or IT goods and services.

The JBE may, in its Local Contracting Manual, place restrictions on the use of sole source procurements or specify a form for sole source requests. If no form is specified

in the Local Contracting Manual, the sole source request may take the form of a memorandum.

### **5.10 SPECIAL CATEGORY NCB CONTRACT REQUEST**

The JBE may, under certain circumstances, establish a special category non-competitively bid contract request (SCR) when it determines that a significant number of repeat NCB procurements of non-IT goods, non-IT services, or IT goods and services will occur. The SCR is limited to a specific type of non-IT goods, non-IT services, or IT goods and services for which:

- There is no viable competition; or
- Competitive bidding cannot be completed using reasonable efforts before the time such non-IT goods, non-IT services, or IT goods and services are required.

The JBE may, in its Local Contracting Manual, place restrictions on the use of SCRs or specify a form for use in SCRs. If no form is specified in the Local Contracting Manual, the SCR may take the form of a memorandum.

The SCR must be signed by the sole source approver. The Buyer should place a copy of the SCR in the procurement file for any procurement of the affected non-IT goods, non-IT services, or IT goods and services.

### **5.11 AMENDMENTS**

The JBE should submit certain amendments to the NCB process outlined below. The NCB process ensures that the amendment is in the best interest of the JBE.

#### **A. Amendments Covered**

The types of amendments covered are those that affect the competitive basis on which the contract was awarded, including amendments that increase or decrease quantity, dollar amounts, or time. Specifically:

- Amendments to a competitively-solicited contract where the type of change contemplated in the amendment was not evaluated in the selection process;
- Amendments to an LPA purchasing document where the type of change contemplated in the amendment was not evaluated during the LPA review process; and

- Amendments to a small purchase (originally under \$5,000) which increase the value of the purchase to \$5,000 or more, if the original purchase was completed pursuant to section 5.1 above.

**Example:** The JBE has a services contract that is nearing expiration, and the JBE wishes to extend the term of the contract using an amendment. The contract was competitively solicited, but renewal terms were not addressed in the Solicitation Document and were not considered by the Evaluation Team. Before extending the term of this contract using an amendment, the JBE should submit the amendment to an NCB process.

**Example:** The JBE has a contract that grants the JBE the option to extend the term of the contract for one year. The contract is nearing expiration, and the JBE wishes to extend the term of the contract using an amendment. The contract was competitively solicited, and the extension term was evaluated during the solicitation process. There is no need to submit the amendment to an NCB process.

**Example:** The JBE purchases 40 chairs, each costing \$100. The value of the purchase (\$4,000) is below \$5,000, and the purchase was completed as an NCB procurement pursuant to section 5.1 above. The JBE wishes to purchase an additional 20 chairs, each costing \$100, through use of an amendment. Because the new value of the contract (\$6,000) will be over \$5,000, the JBE should submit the amendment to an NCB process.

**Note:** Amendments correcting incidental omissions or mistakes (not affecting quantity, dollar amounts, or time) do not require an NCB process. For example, an amendment correcting or updating contact information would not require an NCB process.

## B. NCB Process for Amendments

The Buyer submits an NCB amendment request to the sole source approver.

The NCB amendment request should include the following information:

- Description of the contract terms to be changed;
- Documentation that the pricing of the amended contract is fair and reasonable; and
- Why the Buyer has determined that the amendment is in the JBE's best interest.

## **5.12 TRIAL COURTS: PUBLIC INPUT REQUIREMENT**

A trial court must seek input from the public at least 15 Court Days before execution of an NCB contract in an amount that exceeds the greater of \$400,000 or 10 percent of the total trial court budget.

This requirement does not apply to a contract between a trial court and a county that is provided for by statute (e.g., court-county MOUs under GC 77212).

For detailed requirements regarding this public-input process, see CRC 10.620.

## **5.13 CERTIFICATION AND OTHER REQUIREMENTS IN NCB PROCUREMENTS**

JBEs are required to comply with certain certification and other requirements in NCB procurements. These include:<sup>2</sup>

- Iran Contracting Act certification for purchases of goods or services of \$1,000,000 or more (see chapter 4, section 4.4.C.2 of this Manual);
- Darfur Contracting Act certification for purchases of non-IT goods or services (see chapter 4, section 4.4.C.1 of this Manual); and
- seller's permit requirement for purchases of tangible personal property (see chapter 4, section 4.4.C.3 of this Manual).

In addition, any contract for the purchase of non-IT goods or services with a contractor identified by the Franchise Tax Board or the Board of Equalization as one of the 500 largest tax delinquents is void and unenforceable (see chapter 4, section 4.4.E of this Manual).

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<sup>2</sup> Contracts resulting from NCB procurements must comply with applicable requirements in chapter 8 of this Manual.



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## CONTRACTS

### CHAPTER 8

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## INTRODUCTION

This chapter provides information on preparing, approving, and executing JBE contracts.<sup>1</sup> The main body of this chapter discusses the basic construction of contracts and the mandatory and permissive subject matters for inclusion in JBE contracts. The appendices to this chapter identify mandatory and permissive contract terms for JBE contracts.

## DEFINED TERMS

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

Under California law a “contract” is “an agreement to do or not to do a certain thing.”<sup>2</sup> This chapter refers specifically to agreements for goods and services. Unless expressly excluded from the JBCM or JBCL, or the context dictates otherwise, the term “contract” as used in this chapter includes all agreements for goods or services, including purchase orders (POs), intergovernmental contracts (IGCs), and other documents for goods and services, regardless of the document’s form or title.

## 8.1 BASIC PRINCIPLES

### A. Writing Requirement

All contracts entered into by JBEs must be in writing.

### B. Roles and Responsibilities

Each JBE is responsible for the commercial risks that flow from contracts it enters into and should undertake risks only in proportion to the benefits expected from a contract. Contracts should be prepared, negotiated, and executed in the best interests of the JBE. Contracts should be prepared and negotiated only by persons with appropriate skill and experience who are free from conflicts of interest. Contracts must be executed only by persons with legal authority to do so.

It is the JBE’s responsibility to ensure that the contract meets applicable legal requirements and that the contract terms are appropriate to the type of contract.

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<sup>1</sup> This chapter does not address contracts for public works.

<sup>2</sup> Civil Code section 1549.

## 8.2 CATEGORIES OF CONTRACTS

This subsection describes the basic categories of contracts used by JBEs and when those contracts are used. The category names are used for reference, as an individual contract may have a different name or title. For example, certain MOUs with executive branch agencies may be called “Interagency Agreements” or “IAs.” Requirements in this Manual apply to all contracts in the following categories of contract, unless expressly excluded from the JBCL or JBCM, regardless of the name or title of the contract.

### A. Purchase Orders (POs)

These contracts may be used for purchase of goods from nongovernmental entities<sup>3</sup> regardless of the purchase amount. POs are also often used for purchase of goods and for services that are ancillary to the purchase of the goods. In addition, POs are typically used for “off the shelf” goods and software or for routine, low cost, or low risk services.<sup>4</sup>

- Goods that must be customized or specially manufactured and services of a complex, high risk, or specialized nature should be purchased using a standard agreement.
- Unless the PO is signed by both parties, the proposed Vendor has no duty of performance unless and until the Vendor commences performance of its duties under the PO. If the PO is not to be countersigned and returned to the JBE, the PO should contain a clause that states that Vendor’s commencement of performance under the PO constitutes acceptance and binds the Vendor to all contract terms.

### B. Standard Agreements

These contracts may be used for the purchase of goods or services from nongovernmental entities regardless of the contract amount.

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<sup>3</sup> For purposes of this chapter, a “governmental entity” includes, without limitation, (i) a California department or agency, or a department or agency of any other state, (ii) a public college or state university established by California or any other state, (iii) a local governmental entity or agency in the United States or its territories, including those created as a joint powers authority (iv) an auxiliary organization of the California State University, or a California community college, (v) the federal government, (vi) a foundation organized to support the Board of Governors of the California Community Colleges, (vii) an auxiliary organization of the Student Aid Commission established under Education Code section 69522, or (viii) a public benefit organization. A public benefit organization is an organization chartered by a governmental entity and designed to perform some public benefit such as building or maintaining public infrastructure, or raising bond money for those purposes.

<sup>4</sup> A JBE may wish to adopt in its Local Contracting Manual limitations on the use of POs to purchase services. For example, the JBE may limit the use of POs to services incidental to a purchase of goods, or for services valued at less than a certain dollar amount.

### C. Short Form Agreements

These contracts include fewer terms and conditions than a Standard Agreement, and are typically used for the purchase of goods or services not to exceed \$50,000 from nongovernmental entities.<sup>5</sup> The agreement is intended to be used for routine purchases and in situations where not all of the provisions found in a Standard Agreement would be appropriate. As noted in the appendices to this chapter, fewer terms are required to be included in these agreements than are required in Standard Agreements.

### D. Intergovernmental Contracts (IGCs)

These contracts may be used for any purchase of goods and services between a JBE and another governmental entity. If the other governmental entity is not within the judicial branch, the agreement is often called a Memorandum of Understanding (MOU). If the other governmental entity is another JBE, the agreement is often called an Intra-branch Agreement (IBA). IGCs<sup>6</sup> are simpler and have fewer provisions than POs or Standard Agreements. A JBE, however, always has the option of using a PO or Standard Agreement when contracting with a governmental entity.

## 8.3 PREPARATION OF CONTRACTS

This subsection describes the elements of a contract and typical contract provisions and, where applicable, describes the specific subject matters JBEs should address in particular contract provisions.

Appendices A, B, and C supplement this subsection. These appendices identify the substance of the certifications and provisions that are required to be included in specified categories of JBE contracts. These appendices also indicate which terms are recommended to be included in JBE contracts but are not legally required.<sup>7</sup>

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<sup>5</sup> A JBE may adopt a higher or lower threshold for the use of short form agreements in its Local Contracting Manual. If the JBE adopts a higher threshold, the JBE must ensure that (i) the higher threshold is reasonable and appropriate, and (ii) the JBE provides adequate oversight for the use of larger-value short form agreements. In addition, the JBE must ensure that larger-value short form agreements include all clauses required to be in contracts of the applicable value.

<sup>6</sup> IBAs and MOUs are collectively referred to as IGCs in this Manual.

<sup>7</sup> A JBE is not required to include in the procurement file an explanation for why a recommended CCC or other provision was included in or omitted from a contract.

## A. Content of Contracts

JBEs must include legally required terms in their contracts and should include other terms that the JBE determines are necessary to protect the JBE and mitigate the risks associated with the contract.

Sample language for terms and certifications required to be included in JBE contracts is available from the Judicial Council, together with templates for complete contracts.

Use of these sample provisions and templates is optional. Each JBE may modify the provisions or templates or use its own forms. JBEs may also use a Vendor-provided form contract provided the final contract includes appropriate terms and meets applicable legal requirements.

- Contract elements

Each contract must identify the contracting parties. Contracts typically consist of three major elements:

- Statement of Work (SOW), including the schedule of performance;
- Pricing and payment; and
- Other terms and conditions.

Each of these elements must be clearly defined so that the JBE's needs are met, and the contractor and the JBE understand their performance obligations.

- Each major element is described below, including typical subject matters that are frequently grouped together in contract sections regarding the specific element. However, contract provisions are not required to be in any specific location in the contract. For example, a topic listed below as part of a typical SOW may be placed under a different heading in a particular contract.

### 1. *Statement of Work (SOW)*

The SOW describes the goods to be purchased and/or the services to be performed. The JBE must include a detailed description of the goods to be delivered or the services to be performed, together with any deliverables required and conditions of performance, if applicable. The contract must specify (as applicable): (i) when goods are to be delivered,<sup>8</sup> (ii) when services are to be

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<sup>8</sup> The JBE may, but is not required to, specify a delivery date for goods. If no delivery date is specified, the time for shipment shall be a reasonable time in accordance with Commercial Code section 2309.

performed (start date and end date), (iii) when deliverables must be provided to the JBE, and (iv) when other contract milestones must be completed.

- The following are matters that are typically included in the SOW as part of the detailed description of the goods, services, deliverables, and required conditions of performance:
  - Quantities, specifications, and specific requirements;
  - Quality standards and warranties;
  - Delivery instructions;
  - Acceptance criteria including inspections;
  - Results and required deliverables (e.g., reports, data, or other documentation);
  - Location of performance of services, and contractor's work hours;
  - Performance timelines (schedule) or completion dates;
  - Standards of performance and skill level required and, if applicable, specific personnel and staffing requirements and identification of contractor's key personnel;
  - Details regarding equipment, labor, or materials to be provided by the parties, and coordination of effort, if applicable;
  - Optional goods or services, and provisions for requesting these items; and
  - Possible conditions that may arise during performance of the contract that would trigger modifications to the SOW, cost, or schedule.

## **2. Pricing and payment**

The price the JBE will pay for goods and services under a contract must be clearly stated. The contract should clearly specify the basis for compensation and the terms of payment, such as: lump sum (one-time payment), firm fixed price, unit price, labor rate, or other specific basis.

- Required terms:
  - A provision that makes payment subject to appropriation of funds is required in all contracts requiring the payment of JBE funds unless the JBE has the right to terminate for convenience;<sup>9</sup> and
  - If a JBE is contracting for labor, a schedule listing the hourly, daily, weekly, or monthly cost for each person or job classification must be incorporated into the contract.

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<sup>9</sup> See chapter 11, section 11.10 of this Manual for additional information regarding termination and termination clauses.

- Contracts typically include provisions covering the following subjects, as applicable in the particular circumstances, to specify the basis for compensation and set out the terms of payment:
  - Firm price or not to exceed amount of all compensation;
  - Basis of pricing such as (i) hours times hourly rate (e.g., rates contained in a fee schedule), (ii) costs incurred plus any agreed markup, or (iii) a firm fixed price;
  - For lump sum or firm fixed price contracts, a schedule of billing rates if the schedule was used to establish the lump sum or fixed price of authorized work. The schedule may also be used as the basis for establishing the cost of additional work authorized under the contract;
  - Any cost substantiation requirements and processes;
  - Any allowances that are a part of established prices;
  - Allowable and unallowable pass-through expenses (e.g., travel expenses at state rates);
  - Expense reimbursement substantiation requirements and processes;
  - Payment frequency, and schedule for Progress Payments;
  - Retention or withholding amounts:
    - Each contract should provide for payment, or a reasonable portion thereof, to be withheld pending resolution of any material dispute;
  - Conditions of payment;
  - Pricing of any modifications that may be effected by change order or through exercise of an option;
  - Respecting IGCs only:
    - A JBE should ensure that any overhead or administrative costs are reasonable considering the services being performed and conform to any applicable requirements imposed under the JBE's A-87 Cost Recovery Plan;<sup>10</sup> and
    - A JBE should not pay overhead charges (mark-ups) on more than the first \$25,000 of a subcontract.

### **3. Terms and Conditions**

The contract must include specified rights and obligations of either party that are not included in the SOW or the pricing and payment section, including additional provisions that apply to performance under the contract, as applicable.

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<sup>10</sup> For superior courts, see TCFPPM, FIN 15.02 (Indirect Cost Rate Proposal) for details about cost recovery plans and Office of Management and Budget guidelines.

- **Standard Terms and Conditions.** Contracts typically include the following “standard” or “general” terms and conditions:
  - Terms of shipping or packaging requirements;
  - Contract term, including any options to extend the term;
  - Where contract notices must be directed;
  - Identification of the parties’ representatives;
  - Dispute resolution; and
  - Indemnification.
  
- **Deal Terms and Conditions.** The contract may also include “deal-specific” terms applicable to the particular goods or services being procured or the circumstances of a particular purchase, such as:
  - If establishing an LPA, LPA options, terms, and conditions;
  - Any performance bond requirement;
  - Permits or licenses required of the Contractor and standards of performance required by particular personnel performing the services; and
  - Product warranties, detailed service level agreements, or performance criteria.
  
- **Modification Provisions.** Generally, provisions for modifying contract terms, including provisions for formal amendments, change orders, and exercises of options, if applicable, are required to be in a contract. These terms establish the procedure to be used for each type of modification. If a JBE wants to be able to modify a contract without a formal amendment (i.e., modifying a contract by change order or exercise of an option), the contract must include a change order provision or an option provision. See chapter 11 of this Manual for more information on contract modifications.
  
- **Contractor Certification Clauses (CCCs).** CCCs include certifications from a contractor regarding particular laws. CCCs may include a contractor’s representation or warranty that certain conditions have been met or certain circumstances are true. CCCs may be included in the terms and conditions (often in the representations and warranties section) or may be placed in a separate document that is incorporated by reference into the contract. Appendix A to this chapter contains a chart of typical CCCs, and indicates which categories of contract must include the listed CCCs. If the CCC is not required, it may be listed as recommended for a particular category of contract. Whether or not to include CCCs listed as recommended, and whether or not to include CCCs in contracts when the CCC is not listed as

mandatory or recommended, is in the discretion of the JBE, based on JBE policy and the particular circumstances.

- **Insurance.** When contracting with a nongovernmental entity, the JBE should determine whether to require the contractor to maintain insurance in connection with the performance of the contract. If so, the JBE must determine what types of insurance to require and the minimum dollar levels of each required policy. At a minimum, the JBE should require insurance in contracts involving the performance of high-risk activities described in section 8.4.B.1 of this chapter.

The most common types of insurance include:

- Commercial General Liability. This is a basic insurance policy the JBE should consider requiring. This policy covers bodily injury and property damage liability, including coverage for products, operations, hazard, personal and advertising injury liability, and contractual liability.
- Workers' Compensation and Employer's Liability. This policy should be required if the Vendor has employees.
- Professional Liability. This policy should be required if the Vendor performs consulting or professional services.
- Commercial Automobile Liability. This policy should be required if the Vendor uses an automobile or other vehicle in the performance of the contract.
- Commercial Crime Insurance. If the Vendor handles or has access to the JBE's funds or property of significant value to the JBE, the JBE should consider requiring this coverage.

Notes for contracts requiring insurance:

- If required, the commercial general liability and automobile insurance policies should be endorsed to include the JBE and its officers, agents, and employees as additional insureds with respect to the work performed for or items purchased by the JBE under the contract.
- The contract should state that no payments will be made to the contractor until all required current and complete Certificates of Insurance are properly endorsed and on file with the JBE. Agreements that include commercial crime insurance should state that the work will not begin until

- all required current and complete Certificates of Insurance are properly endorsed and on file with the JBE.
- The JBE should require that Certificates of Insurance include a provision that requires at least 15 days' written notice to the JBE in the event that insurance coverage is cancelled or materially changed.
  - The contract should state that insurance will be issued by an insurance company that is acceptable to the JBE.
  - If a Solicitation Document is used, the JBE should ensure that the required types and levels of insurance are specified in the Solicitation Document.

## B. Special Provisions for IGCs

Because of the inter-governmental nature of IGCs, not all of the subject matters discussed above are necessary in IGCs. In preparing an IGC a JBE should review the information above regarding each element to determine which of the topics are appropriate for inclusion in the particular contract and whether any of the specific requirements noted above apply to the contract. See the appendices for required and recommended certifications and contract provisions for MOUs and IBAs.

## C. Additional Provisions Required in Certain Types of Contracts

Certain clauses are required or recommended for certain types of contracts. Appendix C to this chapter addresses these contracts, listed below:

1. Consulting Services Contracts;
2. Credit Card Issuer Contracts;
3. Equipment Purchase Contracts;
4. Federally Funded Contracts;
5. IGCs (MOUs) with Counties for County Services;
6. IGCs with California Governmental Entities;
7. IGCs with Local Governmental Entities;
8. Information Technology Contracts;
9. Janitorial/Building Maintenance Contracts;
10. Legal Services Contracts;
11. Printing Contracts; ~~and~~
12. Equipment Rental Contracts; and
13. Public Works Contracts pursuant to SB 854

In some instances a single contract may fit into more than one of these types of contracts. For example, an MOU between a court and a county fits types 5, 6, and 7

(and possibly others, depending on the content of the contract). A JBE should ensure that it has consulted all relevant information in appendix C before finalizing a contract.

## **8.4 APPROVAL OF CONTRACTS**

### **A. Review and Approval of Commercial Terms**

Each JBE should establish processes and levels of approval authority for entering into contracts that are consistent with applicable law (including rules of court), and that promote responsible stewardship of public funds and help avoid prohibited conflicts of interest. Consideration should be given to applicable financial and accounting standards and best practices associated with contracting and procurement responsibility. Each JBE should also consider its size and resources when establishing processes and levels of approval authority.

### **B. Legal Review**

JBEs may arrange for legal review of their contracts by their in-house legal staff or retained counsel, or through the Judicial Council's Legal Services office. The JBE should adopt a policy in its Local Contracting Manual describing the circumstances where legal review is required.

The following are circumstances where legal review should be required.

#### **1. High Risk Activities**

The JBE should provide for legal review if the contract provides for the performance of high risk activities. Each JBE should define "high risk activities" in its Local Contracting Manual. High risk activities may include, for example:

- Operating heavy equipment;
- Transporting, holding, or incarcerating a person;
- Applying, treating, removing, storing, or any other handling of hazardous chemicals or other hazardous substances;
- Carrying a firearm, explosive, or other weapon; or
- Transporting outside of secure premises cash, cash equivalents, securities, and other financial instruments with an aggregate value on any occurrence in excess of a certain dollar amount as specified in the Local Contracting Manual.

## **2. Contract template**

The JBE should provide for legal review where the JBE plans to adopt a contract template.

## **3. Contract Modifications**

The JBE should provide for legal review where one or more contract terms are to be modified, and:

- The contract is being modified to resolve a contract dispute; or
- The modification itself triggers a requirement for legal review under the JBE's Local Contracting Manual.

## **4. Certain Substantive Provisions Affecting Legal Risk**

The JBE should provide for legal review if the proposed terms and conditions involve, for example:

- Assuming a risk or contingent liability not under the direct control of the JBE;
- Indemnifying any contractor or third party;
- Substantially narrowing any limitation of liability that favors the JBE as set forth in the JBE's standard terms and conditions;
- Substantially limiting the liability of a contractor or other third party;
- Agreeing to liquidated damages; or
- Releasing any claim or potential claim, or otherwise settling any dispute.

The following are sample circumstances where the JBE may also wish to require legal review.

### **1. Dollar Value of Contract**

The dollar value of the contract is above a certain dollar threshold.

### **2. Revenue Agreements; Financing Agreements**

The contract is a revenue agreement or financing agreement. Revenue agreements include reimbursement, income, receivable, and cost recovery contracts. They typically fall into one of two categories:

- Contracts between a JBE and a private entity, under which the private entity provides services and pays the JBE; or
- Contracts between a JBE and a governmental or private entity, under which the JBE provides services and receives payment for the services.

Financing agreements include equipment lease/finance agreements, installment sales contracts, and other contracts under which compensation for purchased goods or services comes due over time instead of on receipt.

### **C. Review of Certain IT Contracts**

All administrative and infrastructure information technology (IT) projects of the Judicial Council or the courts with total costs estimated at more than \$5 million are subject to review and recommendations of the California Department of Technology, as specified in GC 68511.9<sup>11</sup> (PCC 19204(a)).

## **8.5 EXECUTION OF CONTRACTS**

### **A. Authority**

Contracts may not be executed by persons without authority to do so according to established levels of authority.

### **B. Process**

- Contracts may be either manually signed or digitally signed:
  - If the contract is signed manually, the JBE should create at least two originally signed counterparts of each contract—one for the JBE and one for each contractor. Other than purchase orders, contracts should first be provided to the contractor for signature and then delivered back to the JBE, who will countersign the document and return an original to the contractor. Contracts may be executed in multiple counterparts if the contract so provides. If a manually signed document is delivered to the other party electronically (e.g., by fax or a PDF file attached to an e-mail), receipt should be confirmed and the originally executed counterparts exchanged promptly.
  - If the contract is signed digitally, the JBE must ensure compliance with California Code of Regulations, title 2, sections 22000–22005 (Digital Signatures), promulgated under GC 16.5.
- Contracts (other than POs) should be mutually executed and delivered before work under the contract begins. Any work performed under a contract before

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<sup>11</sup> GC 68511.9 refers to the office of the State Chief Information Officer, which subsequently became the California Technology Agency, and then the California Department of Technology.

it is fully executed and delivered is at the contractor's own risk. If a contract is not mutually executed and delivered before work begins, the contractor may not be paid for that work unless the effective date of the contract is no later than the date work begins.

**C. Payee Data Record**

For information regarding Payee Data Records, see chapter 9, section 9.1.E of this Manual.

## APPENDIX A

### CONTRACTOR CERTIFICATION CLAUSES

The following table lists Contractor Certification Clauses (CCCs) that are **mandatory** in specific categories of contracts; these are marked with an “M.” A provision is designated mandatory if the JBCL requires its inclusion in a contract, or it is required to comply with some other law, rule, or policy.

Other CCCs are **recommended** in specific categories of contracts; these are marked with an “R” in the table below. If a CCC is neither mandatory nor recommended, the table shows no mark.

Some CCCs are listed as recommended but not mandatory because there is no specific requirement that the contractor provide a certification or representation to that effect; the contract and contractor must still comply with the law.

Whether or not to include CCCs listed as recommended, and CCCs that are not listed as mandatory or recommended, is in the discretion of the JBE based on JBE policy and the particular circumstances. JBEs are not required to include in the procurement file an explanation for including or omitting a recommended CCC.

	CCC	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
1.	Authority		R	R	R (see note 1)	
2.	Qualification in California	M (see note 2)	M (see note 2)	M (see note 2)		
3.	No gratuities		R			
4.	No conflict of interest		R			
5.	No interference with other contracts		R			
6.	No litigation		R			

	CCC	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
7.	Compliance with laws	R	R	R	R	
8.	Drug-free workplace		R			
9.	No harassment		R	R		
10.	Nondiscrimination	M	M	M		
11.	Domestic partners, spouses, gender, <u>gender identity</u>	M (see note 3)	M (see note 3)			
12.	National Labor Relations Board	M (see note 4)	M (see note 4)	M (see note 4)		
13.	Expatriate Corporations	M (see note 5)	M (see note 5)	M (see note 5)		
14.	Sweatshop Labor	M (see note 6)	M (see note 6)	M (see note 6)		
15.	Child Support Compliance Act	M (see note 7)	M (see note 7)			
16.	Iran Contracting Act	M (see note 8)	M (see note 8)			

Note 1: It is recommended that all contracts include a general representation as to the Vendor's authority. In MOUs with government agencies, the JBE should obtain a copy of the resolution or other document authorizing the local governing body to enter into the proposed contract, unless performance by the local governmental entity will be completed before any payment by the JBE will be made.

Note 2: Mandatory if (i) Vendor is a corporation, limited liability company, or limited partnership, and (ii) the contract will be performed in California.

Note 3: Applies only to contracts for \$100,000 or more. This CCC may be omitted if, after the JBE has taken all reasonable measures to find a contractor that complies with this CCC, the JBE determines that: (i) there is only one prospective contractor willing to enter into a specific contract with the JBE; (ii) the contract is necessary to respond to an emergency, as determined by the JBE, that endangers the public health, welfare, or safety, or the contract is necessary for the provision of essential services, and no entity that complies with the requirements of this CCC capable of responding to the emergency is immediately available; or (iii) the requirements of this CCC violate, or are inconsistent with, the terms or conditions of a grant, subvention, or agreement, provided that a good

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faith attempt has been made by the JBE to change the terms or conditions of any grant, subvention, or agreement to authorize application of this CCC.

- Note 4: Not applicable to purchases of goods by credit card for an amount less than \$2,500 from any one Vendor, not to exceed in the aggregate \$7,500 per year from the Vendor.
- Note 5: Not applicable to purchases of goods by credit card for an amount of \$2,500 or less from any one Vendor, not to exceed in the aggregate \$7,500 per year from the Vendor. In addition, the Approving Authority, or his or her designee, may waive this requirement upon a written finding that the contract is necessary to meet a compelling public interest. "Compelling public interest" includes, but is not limited to, ensuring the provision of essential services, ensuring the public health and safety, or an emergency as defined in PCC 1102.
- Note 6: Mandatory only if the contract provides (i) for furnishing equipment, materials, or supplies (except related to the provision of public works), or (ii) for the laundering of apparel, garments, or corresponding accessories. Not applicable to purchases by credit card for an amount less than \$2,500 from any one Vendor, not to exceed in the aggregate \$7,500 per year from the Vendor.
- Note 7: Mandatory only if the contract is in excess of \$100,000.
- Note 8: Mandatory only if (i) the JBE is entering into a contract for \$1,000,000 or more and the JBE did not receive an Iran Contracting Act certification as part of the solicitation process, or (ii) the JBE is renewing a contract for \$1,000,000 or more. For additional information, including a sample certification form, see chapter 4, section 4.4.C.2 of this Manual.

## APPENDIX B

### MANDATORY AND RECOMMENDED CONTRACT PROVISIONS

Some of the sample contract provisions below are **mandatory** in specific categories of contracts; these are marked with an “M” in the table below. A provision is designated mandatory if the JBCL requires its inclusion in a contract, or it is required to comply with some other law, rule, or policy.

Other sample contract provisions below are **recommended** in specific categories of contracts; these are marked with an “R” in the table below. If a provision is neither mandatory nor recommended, the table shows no mark. JBEs are not required to include in the procurement file an explanation for including or omitting a recommended CCC.

**Note:** The list in the chart below is not exhaustive. Other provisions may be appropriate depending on the subject matter of the contract and desired allocation of commercial and legal risks between the parties.

For low value, low risk, and short form agreements, JBEs may consider drafting provisions with less detail than in their standard agreements and POs, to the extent the particular language or detail is not expressly required by law.

	Provision	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
1.	Termination due to nonavailability of funds	M (see note 1)	M (see note 1)	M (see note 1)	M (see note 1)	
2.	Loss leader	M (see note 2)	M (see note 2)	M (see note 2)		
3.	Antitrust claims	M (see note 3)	M (see note 3)	M (see note 3)		

	Provision	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
4.	Recycled products/post-consumer material	M (see note 4)	M (see note 4)	M (see note 4)		
5.	Priority hiring	M (see note 5)	M (see note 5)			
6.	DVBE commitment	M (see note 6)	M (see note 6)	M (see note 6)		
7.	Small business preference commitment	M (see note 7)	M (see note 7)	M (see note 7)		
8.	Union activities	M (see note 8)	M (see note 8)			
9.	Insurance	R	R	R		
10.	State Auditor audit provision	M (if over \$10,000)	M (if over \$10,000)	M (if over \$10,000)	M (if over \$10,000)	M (if over \$10,000)
11.	General audit and records provision	R	R	R	R	R
12.	Indemnification by contractor	R	R	R		
13.	Independent contractor provision	R	R	R		
14.	Termination for cause	R	R	R	R	R
15.	Termination by JBE for convenience	R	R	R	R	R
16.	Effect of expiration or termination; survival provisions		R		R	R

	Provision	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
17.	Prohibition on assignment and subcontracting	R	R	R	R	R
18.	Binding on successors		R			
19.	Personnel and background checks		R			
20.	GAAP compliance		R			
21.	Ownership of results, rights in work product	R (see note 9)	R (see note 9)	R (see note 9)	R (see note 9)	R
22.	Confidentiality		R	R	R	R
23.	Publicity		R			
24.	Choice of law (California)	R	R	R	R	
25.	Amendment	R	R		R	R
26.	Waiver		R		R	R
27.	Severability		R		R	
28.	Time of the essence	R	R	R	R	
29.	Negotiated agreement		R			
30.	Headings		R			
31.	Counterparts		R		R	R
32.	Entire agreement	R	R	R	R	R
33.	Informal dispute resolution	R	R	R	R	R

	Provision	PO	Standard Agreement	Short Form Agreement (under \$50,000)	MOU	IBA
<b>34.</b>	Suspension of work		R (see note 10)			

- Note 1: Mandatory unless the JBE has the right to terminate the contract for convenience.
- Note 2: Mandatory in any contract under which goods are provided to a JBE.
- Note 3: Mandatory only if a contract was obtained by means of a competitive bid.
- Note 4: Mandatory if the contract provides for the purchase of goods specified in PCC 12207 (paper products; printing and wrapping papers; mulch, compost, and cocompost products; glass products; lubricating oils; plastic products; paint; antifreeze; tires and tire-derived products; and metal). Also mandatory in janitorial/building maintenance contracts, and printing contracts, as described in appendix C of this chapter.
- Note 5: With certain exceptions, mandatory if a contract includes services in excess of \$200,000. Exceptions: this provision should not be included in (i) consulting services contracts, or (ii) contracts for services related to public works, if the contract value exceeds the amount set from time to time, pursuant to PCC 10105. For information regarding consulting services contracts, see appendix C, section 1 of this chapter.
- Note 6: Mandatory only if a Vendor received a DVBE incentive in connection with the agreement.
- Note 7: Mandatory only if a Vendor received a small business preference in connection with the agreement; applicable only to procurements of IT goods and services.
- Note 8: Certain language is mandatory in any contract that allows for reimbursement of Vendor expenses. Other language is mandatory in contracts if the amount is above \$50,000.
- Note 9: Strongly recommended for IT agreements or other agreements where there is valuable work product.
- Note 10: Recommended if temporary delay is a possibility, particularly in large-scale or complex services agreements.

## APPENDIX C

### ADDITIONAL INFORMATION FOR CERTAIN TYPES OF CONTRACTS

This appendix contains additional information for the following types of contracts:

1. Consulting Services Contracts;
2. Credit Card Issuer Contracts;
3. Equipment Purchase Contracts;
4. Federally Funded Contracts;
5. IGCs (MOUs) with Counties for County Services;
6. IGCs with California Governmental Entities;
7. IGCs with Local Governmental Entities;
8. Information Technology Contracts;
9. Janitorial/Building Maintenance Contracts;
10. Legal Services Contracts;
11. Printing Contracts; ~~and~~
12. Equipment Rental Contracts; and
13. Public Works Contracts pursuant to SB 854

In some instances a single contract may fit into more than one of these types of contracts. For example, a court-county MOU fits within categories 6, 7, and 8 (and possibly others, depending on the content of the MOU). A JBE should ensure that it has consulted all relevant information in this appendix before finalizing a contract.

#### 1. CONSULTING SERVICES CONTRACTS

- a. **Definition.** A consulting services contract (or “consultant services contract”) is a services contract in which the service to be provided is advice or recommendations rather than the use of mechanical or physical skills. The product may include anything from answers to specific questions to the design of a system or development of a plan. Consulting services may include workshops, seminars, retreats, and conferences for which paid expertise is retained by contract, grant, or other payment for services. Consulting services contracts typically do not include:

- Contracts between JBEs and the federal government;

- Contracts with any city, county, JBE, special district, authority or other political subdivision of the state, to subvene federal funds for which no matching state funds are required; and
- Contracts for architectural and engineering services (GC 4525 et seq.).

**b. Contents.** A consulting services contract may include:

- A provision for settlement of contract disputes.
- If the contract is for \$5,000 or more:
  - Detailed performance criteria and a schedule for performance;
  - A requirement that the contractor provide a detailed analysis of the costs of performing the contract;
  - A resumé for each contract participant who will exercise a major administrative role or major policy or consultant role, as identified by the contractor; and
  - A statement that the JBE will evaluate the contractor's performance.

## **2. CREDIT CARD ISSUER CONTRACTS**

GC 6159(d) establishes the minimum requirements that must be met when a JBE enters into a contract with a credit card issuer allowing the JBE to accept payments by credit card. These contracts must define:

- The respective rights and duties of the JBE and credit card issuer regarding the presentation, acceptability, and payment of credit card drafts;
- A reasonable method to facilitate payment settlements;
- A reasonable fee or discount to be paid to the credit card issuer; and
- Other matters that may be agreed upon by the parties.

For superior courts: additional information regarding credit card payments is set forth in the TCFPPM, FIN 10.01 (Revenue Collection and Distribution) and FIN 10.02 (Cash Handling).

## **3. EQUIPMENT PURCHASE CONTRACTS**

Contracts providing for the purchase of equipment using JBE funds should include a provision in substance as follows:

- Title to equipment purchased or built with JBE funds vests in the JBE upon payment of the purchase price; and

- The JBE may, at its option, repair any damaged or replace any lost or stolen items and deduct the cost thereof from contractor's invoice to the JBE, or require contractor to repair or replace any damaged, lost, or stolen equipment to the satisfaction of the JBE at no expense to the JBE. If a theft occurs, contractor must file a police report immediately.

#### **4. FEDERALLY FUNDED CONTRACTS**

All contracts subject to this Manual that are funded in whole or in part by the federal government should contain a 30-day cancellation provision and the following provisions:

- It is understood between the parties that this Agreement may have been written for the mutual benefit of both parties before ascertaining the availability of congressional appropriation of funds, to avoid program and fiscal delays that would occur if the contract were executed after that determination was made. This contract is valid and enforceable only if sufficient funds are made available to the JBE by the U.S. Government for the fiscal year in which they are due and consistent with any stated programmatic purpose. In addition, this Agreement is subject to any additional restrictions, limitations, or conditions enacted by the Congress and to any statute enacted by the Congress that may affect the provisions, terms, or funding of this contract in any manner.
- The parties agree that if the Congress does not appropriate sufficient funds for the program, this Agreement shall be amended to reflect any reduction in funds.
- The parties may invalidate this Agreement under any termination for convenience or cancellation provision or amend the contract to reflect any reduction in funds.

JBEs using federal assistance for procurement should be aware of any applicable third party contracting requirements that may be a condition of a specific grant. JBEs should consult with legal counsel as appropriate to ensure compliance with all grant conditions.

#### **5. IGCs (MOUs) WITH COUNTIES FOR COUNTY SERVICES<sup>1</sup>**

If a superior court and its county agree that the county will provide or continue to provide services to the court that were provided in 1997, GC 77212 requires the superior courts and county to enter into a contract regarding the services. The parties must cooperate in developing and implementing the contract. The contract is typically in the form of an MOU.

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<sup>1</sup> This section does not apply to security MOUs between a superior court and a county.

- Services provided to the court may be discontinued by either party giving written notice to the other no later than 90 days before the end of the fiscal year (i.e., prior to April 1); some MOUs may require earlier notice. Service discontinuation only becomes effective at the beginning of the new fiscal year (July 1), per GC 77212(b) and (c).
- Under CRC 10.805, if the superior court receives or issues a notice regarding the discontinuation of county-provided services under GC 77212, a copy of the notice must be provided to the Judicial Council Director of Finance within 10 days of the notice issue or receipt date.
- GC 77212(d) specifically requires that a court-county agreement identify the scope of services, the method of service delivery, the term of the agreement, the anticipated services outcomes, and the cost of the services. A court-county agreement for services should also contain appropriate provisions applicable to IGCs generally under this chapter.
- GC 77212(a) states that services provided to a court shall be provided at a rate that shall not exceed the costs of providing similar services to county departments or special districts. A court may include this clause in its court-county MOU:

**Costs.** Costs charged to the court may not exceed the costs of providing similar services to county departments or special districts (GC 77212(a)).

- Counties periodically approve “cost allocation plans” detailing the actual expenditures by departments that provide indirect services to county departments and identifying the specific cost allocation methods that are used to distribute those costs. For purposes of determining the costs associated with its contract with the county, the contract should allow the superior court to review the specific charges in the cost allocation plan that were used to complete the plan, including the data elements provided by each county department.
- The amount of any indirect or overhead costs must be individually stated, together with the method of calculation of the indirect or overhead costs.<sup>2</sup>
- The Judicial Council or its delegate may audit the county figures to ensure compliance with this requirement and determine the reasonableness of the indirect or overhead costs charged to the superior court.
- CRC 10.810 defines the division of responsibility between the state and county for funding the superior court. Costs payable by a superior court under

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<sup>2</sup> This requirement is limited to contracts entered into after January 1, 2002. See GC 77212(d).

any IGC, including agreements covered by GC 77212, may not contain items that are not otherwise allowable court operations.

## 6. IGCs WITH CALIFORNIA GOVERNMENTAL ENTITIES

Except for IBAs, JBEs should include the following waiver provision, or a similar provision modified as appropriate to address any indemnity provision in the contract:

**Waiver of Per Capita Risk Allocation.** The parties waive the per capita risk allocation set forth in Government Code section 895.6. Instead, they agree if one of them is held liable upon any judgment for damages caused by a negligent or wrongful act or omission occurring in the performance of this Agreement, the parties' respective pro-rata shares in satisfaction of the judgment will be determined by applying principles of comparative fault.

## 7. IGCs WITH LOCAL GOVERNMENTAL ENTITIES

When a JBE contracts with a county, city, district, or other local governmental entity, the JBE should require, together with the signed contract, a copy of the resolution or other document authorizing the local governing body to enter into the proposed contract. When performance by the local governmental entity will be completed before any payment by the JBE, however, such as a room rental or a one-time event, the JBE does not need to obtain this documentation. The JBE may wish to include the following provision in the contract (e.g., in the CCCs):

**Authority.** Attached is a true copy of the code, rule, resolution, order, motion, or ordinance authorizing Contractor to enter into or execute this Agreement.

## 8. INFORMATION TECHNOLOGY CONTRACTS

When contracting for the performance of IT services, the contract should specify who will own the work product. If the JBE will own the work product, the contract must assign ownership to the JBE. If the contractor or some other party will own the work product, the contract should provide the JBE a worldwide license to the work product at no additional cost. The license should be broad enough to allow the JBE to use the work product for any reasonable purpose. The JBE may also want to consider whether the contract should provide the JBE a right to sublicense the work product at no additional cost.

If the contract is for the purchase of systems, software, or instrumentation with imbedded chips, JBEs should include a provision substantially similar to the following in the contract:

**Four-Digit Date Compliance.** Contractor represents and warrants that it will provide only Four-Digit Date Compliant deliverables and/or services to [JBE]. “Four-Digit Date Compliant” deliverables and services can accurately process, calculate, compare, and sequence date data, including without limitation date data arising out of or relating to leap years and changes in centuries. The contractor’s warranty and representation are subject to the warranty terms and conditions of this Agreement and do not limit the generality of warranty obligations set forth elsewhere in this Agreement.

## 9. JANITORIAL/BUILDING MAINTENANCE CONTRACTS

The contract should provide that the contractor must retain for 60 days any employees employed at each site by the contractor/subcontractor who previously provided those services.<sup>3</sup>

End of Contract. The contract should require the contractor upon termination of the contract to provide upon request information sufficient to identify employees providing janitorial or building maintenance services at each site and to make the necessary notifications required under Labor Code section 1060 et seq.

To the extent economically feasible, the contract should also require the use of supplies containing recycled products only, and must contain a recycled products/post-consumer material clause. (See chapter 3, section 3.3 of this Manual for additional information on recycling requirements.)

## 10. LEGAL SERVICES CONTRACTS

Legal services contracts with nongovernmental entities must contain, in substance, the following provisions. However, these provisions are not required in contracts with governmental entities, such as court-county MOUs.

The contractor shall:

- a. Adhere to legal cost and billing guidelines designated by the JBE.
- b. Adhere to litigation plans designated by the JBE, if applicable.
- c. Adhere to case phasing of activities designated by the JBE, if applicable.
- d. Submit and adhere to legal budgets as designated by the JBE.

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<sup>3</sup> This does not apply to court/county MOUs for janitorial and maintenance service. See GC 71626.1 for applicable law regarding transfer of janitorial and maintenance services between court and county.

- e. Maintain legal malpractice insurance in an amount not less than the amount designated by the JBE.
- f. Submit to legal bill audits and law firm audits if so requested by the JBE. The audits may be conducted by employees or designees of the JBE or by any legal cost-control provider retained by the agency for that purpose.

If (a) the contract amount is greater than \$50,000, (b) the services are not the legal representation of low- or middle-income persons, in either civil, criminal, or administrative matters, and (c) the services are to be performed within the state of California, then the following language (or equivalent) must be added to the legal services contract:

Contractor agrees to make a good faith effort to provide a minimum number of hours of pro bono legal services, or an equivalent amount of financial contributions to qualified legal services projects and support centers, as defined in section 6213 of the Business and Professions Code, during each year of this Agreement equal to the lesser of either (i) 30 multiplied by the number of full time attorneys in the firm's offices in California, with the number of hours prorated on an actual day basis for any contract period of less than a full year or (ii) the number of hours equal to 10 percent of the contract amount divided by the average billing rate of the firm. Failure to make a good faith effort may be cause for nonrenewal of this Agreement or another judicial branch or other state contract for legal services, and may be taken into account when determining the award of future contracts with [JBE] for legal services.

## **11. PRINTING CONTRACTS**

To the extent economically feasible, the contract should require the use of recycled paper only. The contract must contain a recycled products/post-consumer material clause. (See chapter 3, section 3.3 of this Manual for additional information on recycling requirements.)

## **12. EQUIPMENT RENTAL CONTRACTS**

A JBE should not agree to:

- Indemnify a contractor;
- Assume responsibility for matters beyond its control;
- Agree to make payments in advance;
- Accept any other provision creating a contingent liability against the JBE; or

- Agree to obtain insurance to protect the contractor.

The contract should provide that the JBE does not have responsibility for loss or damage to the rented equipment arising from causes beyond the control of the JBE. Any provision obligating the JBE to return the equipment in good condition, subject to reasonable wear and tear, also should except or exclude loss or damage arising from causes beyond the control of the JBE. The contract should expressly limit the JBE's responsibility for repairs and liability for damage or loss to that made necessary by or resulting from the negligent act or omission of the JBE or its officers, employees, or agents.

If the JBE does not elect to maintain the equipment, the contract should:

- Place the obligation on the contractor, as lessor, to keep the equipment in good working order and to make all necessary repairs and adjustments without qualification; and
- Include a clear right in the JBE to terminate or cease paying rent should the contractor fail to maintain the equipment properly.

Personal property taxes are not generally reimbursed when leasing equipment. If the contractor does not bargain for the JBE to pay the taxes, the contract should state the JBE will not do so.

### **13. PUBLIC WORKS CONTRACTS PURSUANT TO SB 854**

Procurement and contracting for public works projects<sup>4</sup> involve significant requirements for JBEs and contractors relating to prevailing wage, including, but not limited to the following pursuant to SB 854 (Stat. 2014, Ch. 28):

- All bidders for public works contracts and their respective subcontractors must be registered with the Department of Industrial Relations (DIR).<sup>5</sup> A bid shall not be

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<sup>4</sup> Under the California Labor Code, public works include, for example, construction, alteration, demolition, installation, repair, or maintenance work that is paid for in whole or in part out of public funds (Labor Code §§ 1720(a)(1) and 1771). Public works also include, but are not limited to, carpeting (Labor Code § 1720(a)(5)), refuse hauling (Labor Code § 1720.3), and the assembly and disassembly of freestanding and affixed modular office systems (Labor Code § 1720(a)(1)).

**Note:** under PCC 19204(c), the California Judicial Branch Contract Law (JBCL) does not apply to procurement and contracting for trial court construction, including, but not limited to, the planning, design, construction, rehabilitation, renovation, replacement, lease, or acquisition of trial court facilities. However, under PCC 19204(c), the JBCL does apply to contracts for maintenance of all judicial branch facilities that are not under the operation and management of DGS. Therefore, information on SB 854 is being provided in this Manual pursuant to public works projects that are covered by the JBCL.

<sup>5</sup> Labor Code §§ 1771.1 and 1725.5.

accepted nor any contract or subcontract entered into for a public works project without proof of the contractor or subcontractor's current registration with the DIR.<sup>6</sup>

- A PWC 100 form must be filed by a JBE with the DIR within five days of the award of a public works contract.<sup>7</sup> PWC 100 forms can be submitted electronically to the DIR at: <https://www.dir.ca.gov/pwc100ext/>
- Required provisions for bid documents and contracts for public works projects.<sup>8</sup>

Additional requirements relating to prevailing wage apply to public works projects, including their bid documents and contracts. If you would like further information, please contact the Judicial Council's Legal Services office, or visit the DIR's Public Works website (<http://dir.ca.gov/Public-Works/PublicWorks.html>).<sup>9</sup>

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<sup>6</sup> Labor Code § 1771.1(b). Please also note that under Labor Code § 1771.4(a)(2), the JBE awarding the contract shall post or require the prime contractor to post job site notices as prescribed by regulation. (For information on the current regulation, contact the DIR.)

<sup>7</sup> Labor Code § 1773.3.

<sup>8</sup> Labor Code §§ 1771.1(b) and 1771.4(a)(1).

<sup>9</sup> This external link is being provided for general information purposes only. The Judicial Council does not warrant the accuracy, availability, or completeness of the information on the DIR website.